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No. 03-

IN THE

Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS, ET AL.,
Petitioners,

v.

ARLEEN FREEMAN AND JAMES ALEXANDER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, as the Ninth Circuit held, an agreement between joint venturers to set a price for services that are concededly necessary to support their new, procompetitive product may nevertheless be condemned, under Section 1 of the Sherman Act, as unlawful per se?

PARTIES AND RULE 29.6 STATEMENT

The parties to this petition are the San Diego Association of Realtors®, North San Diego County Association of Realtors®, Pacific Southwest Association of Realtors®, East San Diego County Association of Realtors®, Coronado Association of Realtors® (collectively, the "associations"), and SANDICOR, Inc. ("Sandicor").

Pursuant to Rule 29.6 of the Rules of this Court, the Associations state that they are non-profit mutual benefit corporations; none has a parent or any publicly held corporation that owns 10% or more of its stock. Sandicor is a California domestic stock corporation, wholly owned by the associations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners San Diego Association of Realtors® *et al.* respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 322 F.3d 1133, and is reprinted as reported in the appendix (Pet. App.) at 1a-35a. The order of the court of appeals amending the initial opinion, and denying rehearing and rehearing en banc, is unpublished (and not currently reflected in the published versions), and is reproduced at Pet. App. 121a-122a. The opinion of the district court is unpublished, and is reproduced at Pet. App. 36a-78a. The opinion of the California Court of Appeal affirming dismissal of the prior state court lawsuit is published at 91 Cal. Rptr. 2d 534, 77 Cal. App. 4th 171, and is reprinted at Pet. App. 79a-120a.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on March 10, 2003. The order amending the opinion, and denying rehearing and rehearing en banc, was filed on April 24, 2003. On July 9, 2003, Justice O'Connor extended the time for filing the petition to and including August 22, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION

Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

> nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This petition raises a recurring issue of central importance to Section 1 of the Sherman Act and to competition policy: the circumstances under which the per se rule may be applied to legitimate joint ventures.

The case arises out of the decision of eleven local associations of Realtors® in San Diego County (the "associations") to merge their individual and unique real property multiple listing services ("MLS") to create, for the first time, a county-wide multiple listing service. Previously, each association's MLS included property listings from what was essentially a geographically distinct, non-overlapping area of the County. As the Ninth Circuit observed, "[n]one of the essential facts is disputed." Pet. App. 10a, 3a n.1. All agree that creating this new MLS was a procompetitive joint venture that reduced operating costs, facilitated competition among individual real estate agents, and made it more efficient for consumers to buy and sell homes. *Id.* at 4a, 34a, 64a-65a. The principal dispute is whether an agreement by the joint venturers on the price of services "necessary" to the operation of the new MLS and which the associations were uniquely suited to provide was unlawful under Section 1 of the Sherman Act.

1. Multiple Listing Services Before 1991. For decades, real estate agents have cooperated to combine the listings of homes-for-sale that each individual agent had obtained. Such

consolidated or "multiple" listing services help both buyers and sellers of homes, each of whom has an interest in gaining ready access to the widest number of potential homes-for-sale or home-purchasers as practicable. Such services also increase the competition between real estate agents for facilitating the purchase and sale of homes by lowering each agent's transaction costs, and ensuring that a purchaser or seller need not work only through one particular agent to gain access to a particular home or buyer. Pet. App. 3a-4a, 64a.

The first multiple listing services were created by cooperating real estate agents who compiled their listings into a book that was distributed to all participating agents. Beginning in the late 1970s, the listings were also compiled in electronic form and made available by access through dedicated computer terminals and, more recently, through personal computers as well.

Originally, multiple listing services were provided to real estate agents in San Diego County principally by the eleven local associations. Pet. App. 39a. Each local association operated an MLS that served a separate area of San Diego County, with the MLSs of all eleven associations collectively covering the entire county. *Id.*[1] Each association set prices and provided support services for its own MLS. *Id.* at 3a.

Each local association also developed and maintained its own geographically unique set of property listings. With few exceptions, there was no overlap between the listings available from one association's MLS and another's. A real estate agent who joined an association-owned MLS that served the geographic area in which that agent's business was

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[1] A twelfth group, not affiliated with the National Association of Realtors®, maintained an independent database. Its listings featured properties in one community (La Jolla) and overlapped the listings in the local association's database that also served that area. This twelfth group did not participate in forming Sandicor and was not considered relevant to the issues below. Pet. App. 3a-4a & n.3, 39a-40a.

located submitted all qualified listings from that area to the local association's MLS. To have access to listings outside the geographic area served by that association's MLS, an agent had to subscribe and pay fees to more than one MLS. Pet. App. 3a, 39a-40a.

In the 1980s, some of the local associations began to consolidate their MLSs. By 1991, San Diego was served by four MLS databases, each with its own rules and system requirements, and each independently supported by the eleven local associations. To obtain access to all listings in San Diego County in 1991, an agent still "had to subscribe to more than one MLS." Pet. App. 3a.

2. Formation of Sandicor, Inc. By 1991, with their computer equipment needing replacement and the potential benefits of further consolidation now clear, the associations discussed whether to form a county-wide MLS. They chose to do so by creating a new privately held corporation, "Sandicor, Inc." Sandicor is wholly owned by the local associations, which appoint its board of directors. Pet. App. 4a-5a.

The associations assigned some essential aspects of the operation of the new county-wide MLS to Sandicor, but determined that other necessary functions could be performed equally well or better by the associations. They decided that Sandicor would be responsible for purchasing servers and maintaining the electronic database of listings, for establishing rules and regulations, and for providing the associations with standardized forms, supplies, and training in how to use the new county-wide database. The associations, in contrast, would be responsible for other "necessary" tasks, including "enroll[ing] new MLS subscribers, bill[ing] and collect[ing] payments, ensur[ing] that postings comply with guidelines, and provid[ing] support staff to answer subscribers' questions." Pet. App. 3a. It is undisputed, and the Ninth Circuit acknowledged, that providing such support services is "part of the *necessary* overhead of delivering an

MLS." *Id.* (emphasis added). Indeed, it is obvious that if an MLS cannot enroll, bill, collect from, or assist subscribers, it cannot function at all.

Finally, the associations agreed upon uniform payments that each would receive from Sandicor for providing Sandicor with these necessary support services. See Pet. App. 123a-129a (sample service agreement). They initially set the principal monthly payment from Sandicor to the local associations at $25.00 per subscriber. This level was higher than the (allegedly $10) per-subscriber cost that the largest local association (San Diego) had formerly incurred for providing support services to its (south county) MLS, but lower than the costs (allegedly $50) that two of the smallest associations (Fallbrook and Valley Center) had formerly incurred for supporting their (north county) MLS. *Id.* at 4a-5a. It was further agreed that MLS subscribers would pay a stated monthly fee to Sandicor, and that none of the associations would discount this fee or credit any portion of it against other services. *Id.* at 5a.

It is undisputed that compensating the local associations at a uniform per-subscriber rate higher than a $10 rate, as well as providing an additional subsidy to the two smallest associations, was essential to reaching agreement on creating a county-wide MLS. The smaller associations needed the additional revenue to cover their costs of providing support services, and to induce them to contribute their unique sets of listings (which were their principal revenue-generating assets) to the new county-wide MLS. "Without the revenue guaranteed by the fixed support fee, 'the smaller Associations would not have joined,' and Sandicor would not have had a 'truly regional MLS.'" Pet. App. 6a.

3. The State Court Litigation. Respondent Arleen Freeman (a local real estate agent) initially sued Sandicor, the associations that own Sandicor, and certain individual directors of the associations and of Sandicor in California state court. Pet. App. 79a-80a & n.1. Her complaint, filed in

1997, alleged, *inter alia*, that the defendants violated California's antitrust laws by engaging in price-fixing and by tying the sale of MLS listings to MLS support services. The trial court dismissed her complaint and the court of appeal affirmed. *Freeman* v. *San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 91 Cal. Rptr. 2d 534 (1999), Pet. App. 79a-120a.

Relying on federal law authorities, the California Court of Appeal held that the complaint, on its face, did not state a claim for price-fixing. The court observed that the allegedly fixed price was merely the price of "a new product – the county-wide MLS" created by a joint venture. Plaintiff "did not allege" that separate entities conspired to fix a price for a good or service that they would otherwise "separately" compete to provide. The price-fixing claim was thus legally deficient. Pet. App. 101a-102a. The court also dismissed Freeman's tying claim because there obviously is no market for the allegedly "tied" product (the support services for an MLS) that is separate from the market for the tying product (the database of listings). *Id.* at 90a, 91a-94a.

4. The District Court's Ruling. After the state trial court dismissed her antitrust suit, Ms. Freeman, joined by two other real estate agents, re-filed her suit in federal court, this time pleading claims under the Sherman Act. After dismissing all but one of the individual defendants and allowing extensive discovery, the district court granted defendants' motion for summary judgment on the merits of plaintiffs' Sherman Act claims. Pet. App. 44a-45a, 75a-76a.

The district court held that plaintiffs' price-fixing claims mischaracterized the nature of the joint venture. The service center functions "are in fact part of the MLS services Sandicor offers." Pet. App. 58a. The allegedly unlawful agreements simply "require the Associations to deliver these [support] services – as part of *Sandicor*'s MLS services – *to Sandicor*'s MLS participants." *Id.* at 60a. There was thus no evidence to support "Plaintiffs' claim that the Associations

sell service center functions to Sandicor who passes on an inflated price to consumers." *Id.* Rather, "Sandicor's founders favored the operation of service centers by the local Associations 'due to the great efficiencies that result from the sharing of facilities and personnel between MLS and Association activities.'" *Id.* at 42a; see *id.* at 58a-60a, 68a.

The district court also rejected plaintiffs' principal argument, under this Court's decision in *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972) ("*Topco*"), that the price agreements were unlawful per se. The district court distinguished *Topco* as a case that did not involve a restraint "ancillary to the creation of a new product or service that could not have been created without joint conduct." Pet. App. 64a. Here, by contrast, Sandicor "was created to provide a pro-competitive product." *Id.* "The benefit of Sandicor's countywide MLS," according to the district court, "is that real estate agents now only need to purchase MLS services from one Association to obtain countywide property information." *Id.* at 41a. This product, moreover, "could only be achieved by each of the Associations contributing their separate MLSs – each covering only a portion of San Diego County – to create a countywide MLS." *Id.* at 64a. Where the alleged restraint solely affects competition related to supporting a wholly new product created by the venture itself, the participants in that venture are permitted to "set a price." *Id.*

5. The Ninth Circuit's Decision. The Ninth Circuit reversed the district court's decision to grant summary judgment for the local associations and Sandicor as to price-fixing, and stated that the district court "should have . . . awarded it to plaintiffs instead." Pet. App. 35a.[2] The court of appeals held that the agreement between the associations and

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[2] The Ninth Circuit affirmed summary judgment in favor of defendants on plaintiffs' Section 2 claim, and also affirmed summary judgment on all claims as to defendant California Association of Realtors®. These holdings are not at issue here.

Sandicor on a uniform per-subscriber payment for the provision of support services was a price-fixing agreement among horizontal competitors that is unlawful per se.

The court of appeals took as its point of departure this Court's statement in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 345 (1982) ("*Maricopa*") that "'"no showing of so-called competitive abuses or evils which those [price-fixing] agreements were designed to eliminate or alleviate may be interposed as a defense."'" See Pet. App. 10a (also quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)). The Ninth Circuit rejected the district court's and California Court of Appeal's holdings that the associations and Sandicor were effectively a single entity entitled to set a price for its new product, which none of them separately did provide or could have provided. Pet. App. 10a-16a. Citing, *inter alia*, *United States* v. *Topco Assocs.*, 405 U.S. 596 (1972), and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) ("*Sealy*"), the Ninth Circuit held that the challenged agreement restrained price competition between "at least potential" if not "*actual* competitors" (see Pet. App. at 18a-20a), and was unlawful per se. *Id.* at 18a-22a, 22a-28a.

The court of appeals also rejected petitioners' argument that under *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), the agreement on the price of support services was lawful, or at least subject to evaluation under the rule of reason. The court viewed *BMI* as limited to agreements that are a "'necessary consequence'" of a joint venture (Pet. App. 22a (quoting *BMI*, 441 U.S. at 21)), and offered several reasons why, in the court's view, an agreement as to a single price for support services was not "necessary as a matter of law." *Id.* at 23a-27a. The court speculated, for example, that the associations could have chosen to price the support services they offered individually, thereby permitting the "most efficient" association (the San Diego Association of Realtors®) to offer a lower price than the allegedly "supracompetitive" price to which the joint venturers agreed.

Id. at 10a-12a, 26a-27a. The court also suggested that the other venturers could have either "increased the subsidies to the[] two [smallest] associations," or "formed [the new MLS] without them and then competed for their 400 subscribers." *Id.* at 27a.

In short, the court of appeals viewed the case as a classic example of unlawful price-fixing: "Rarely do antitrust defendants serve up their own heads on so shiny a silver platter." Pet. App. 21a. If creating a county-wide MLS could come about only through the sacrifice of smaller associations, so be it: "The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's vividly worded opinion is intended to influence future decisions involving pricing agreements related to joint ventures. Yet its provocative application of the per se rule to an integrated, efficiency-enhancing joint venture is profoundly wrong.

The Ninth Circuit accepts as true that the county-wide MLS was a new and procompetitive service that could have been created only by integrating the unique assets of each association. Pet. App. 4a; see *id.* at 64a. The Ninth Circuit also acknowledges that the challenged price agreement was for "part of the necessary overhead of delivering" that new MLS. *Id.* at 3a. The agreement at issue thus restrained, at most, only an aspect of competition that the joint venture itself made possible. In these circumstances, where joint venturers set a price for services necessary to support their new procompetitive product, the per se rule should not apply as a matter of law.

In comparable circumstances, both the First and Seventh Circuits have squarely rejected the application of the per se rule. This conflict alone warrants plenary review, because clarity and uniformity in this area of antitrust law are

particularly important. As the Federal Trade Commission ("FTC") recently observed, there is no issue "more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals."[3]

The Ninth Circuit's analysis and result are also contrary to the *Antitrust Guidelines For Collaborations Among Competitors* ("*Collaboration Guidelines*"), jointly issued by the FTC and the United States Department of Justice (DOJ) (collectively, the "Agencies"), to help define the boundaries of acceptable collaboration, to dispel confusion about how the Agencies now apply Section 1 to joint ventures, and to avoid deterring procompetitive joint ventures. Applying the *Collaboration Guidelines*, it is evident that neither Agency would have objected to the challenged agreement as unlawful per se. This inconsistency further justifies review by this Court.

Finally, the Ninth Circuit's decision highlights the significance of tension in this Court's leading joint venture decisions and confirms the need for clearer guidance from this Court. The Ninth Circuit narrowly construed *BMI*, and instead relied on *Maricopa* and *Topco*, which each condemned per se a horizontal agreement among joint venturers that the competitors sought to defend as procompetitive under the rule of reason. Other circuits, and the Agencies, view *BMI* as establishing the basic analytical framework for legitimate, efficiency-enhancing joint ventures. They treat *Maricopa* as a case not involving a truly "integrated" joint venture, and *Topco*'s "rigid" directive to apply the per se test in all horizontal pricing cases as "effectively overruled." The latter view is consistent with this Court's post-*Maricopa* cases, which discourage lower courts

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[3] *Polygram Holding, Inc.*, No. 9298, slip op. at 2 (F.T.C. July 24, 2003) (opinion), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf.

from applying the per se rule to potentially procompetitive conduct.

In short, this Court's joint venture precedents are unclear and, as a result, the Ninth Circuit has read *BMI* too narrowly and *Topco* and *Maricopa* too broadly. This is precisely the opposite of the reading that other circuits and the Agencies have given these cases and reinforces the perception, dangerous to competition, that the Sherman Act is hostile even to procompetitive joint ventures. The Court should resolve this tension and the conflicts below, reject use of the per se rule to condemn pricing agreements for services necessary to support the procompetitive products of legitimate joint ventures, and affirm the lawfulness of the agreement challenged here.

1. The First Circuit has repeatedly held that a price agreement that is "part of a larger, legitimate economic venture" is not unlawful per se. *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001); *Addamax Corp.* v. *Open Software Found., Inc.*, 152 F.3d 48, 51-52 (1st Cir. 1998).

In *Augusta News*, the plaintiff formerly distributed periodicals to certain outlets of large chain stores. Other competing distributors formed a joint venture, and agreed to provide chain stores with up-front per-store fees in return for exclusive distribution contracts. The First Circuit rejected plaintiff's claim that these fee agreements between horizontal competitors were unlawful per se. It observed that the joint venture was procompetitive, in that it offered "one stop service for large buyers" which none of the smaller competing distributors "could as easily provide by itself." 269 F.3d at 48. The "up-front payments" were not strictly necessary to the venture and might have been "attacked under the rule of reason." *Id.* But because they were part of a "bona fide joint venture," they could *not, as a matter of law*, be attacked as unlawful per se. *Id.* at 49.

In *Addamax*, a joint research and development foundation established by large computer manufacturers allegedly engaged in unlawful price-fixing by forcing down the price of key software inputs below market levels. The First Circuit held that "[w]here the venture is producing a new product . . . conduct that is strictly ancillary to this productive effort (*e.g.*, *the joint venture's decision as to the price at which it will purchase inputs*) is evaluated under the rule of reason." 152 F.3d at 52 (emphasis added).

Like the defendants in *Addamax*, the petitioners agreed to a price at which they would "purchase inputs" – *i.e.*, support services necessary for the new MLS. And as in *Augusta News*, the petitioners established a "bona fide" joint venture that created a new product (a county-wide MLS) that no individual association "could as easily provide by itself." There is no question that the First Circuit, applying *Addamax* and *Augusta News*, would have roundly rejected respondents' per se claim as a matter of law.

The Seventh Circuit also would have rejected respondents' per se attack. In its seminal opinion in *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985), the court reversed a finding that an agreement between two retailers not to compete in certain product lines was unlawful per se. The Seventh Circuit observed that "[j]oint ventures, mergers, systems of distribution – all these and more require extensive cooperation, and all are assessed under a Rule of Reason . . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Id.* at 188. Significantly, the same self-preservation concern of joint venture partners that was dismissed by the Ninth Circuit (Pet. App. 24a) provided an important basis for the Seventh Circuit's application of the rule of reason. The Seventh Circuit recognized that certain cooperation will occur only if one "[k]now[s] that he is not cutting his own throat by doing so," and so where the restraint affected only new competition

that itself was made possible by the joint venture, the "Rule of Reason" should apply. *Polk Bros.*, 776 F.2d at 189-90.

More broadly still, in *Chicago Professional Sports Limited Partnership* v. *National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996), the Seventh Circuit reversed findings that a league of individually owned sport teams could not be treated as a single entity and had unlawfully fixed broadcast-fees that teams paid to the league. The Seventh Circuit held that legitimate collaborative activity is either lawful (if undertaken by what should be deemed a "single entit[y]" in a given situation), or else "assessed under the Rule of Reason."[4] *Id.* at 598; see *id.* at 599 (same).

Had the Seventh Circuit evaluated the challenged agreement here under the single entity/joint venture "typology" set forth in *Chicago Professional Sports*, it would have affirmed the district court. It might have agreed with the district court (and the state court of appeal) that in setting a price for support services necessary to running the new county-wide MLS, the petitioners did not "'deprive[] the marketplace of the independent centers of decisionmaking that competition assumes,'" but simply set a price for an input integral to a new product.[5] Because the support services were

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[4] In this respect, the Seventh Circuit's treatment of "interdependent multi-party enterprises" was echoed by the First Circuit in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58-59 (1st Cir.), *cert. denied*, 123 S.Ct. 118 (2002), where Chief Judge Boudin recognized that sports leagues, like "franchising arrangements and joint ventures that perform specific services for competitors," should be evaluated either under the developing single entity doctrine, or under a "more flexible" rule of reason analysis, but that unquestionably "[t]he rejection of the *per se* rule [in these circumstances] is straightforward." *Id.*

[5] *Chicago Sports*, 95 F.3d at 598 (quoting *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984)); *see also* Pet. App. 63a-64a (relying on same aspect of *Copperweld*); *City of Mount Pleasant, Iowa* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268, 274-77 (8th Cir. 1988).

part of the "necessary" overhead of any MLS, the Seventh Circuit thus might have rejected the Ninth Circuit's attempt to ensure that the venture set a "fair" price for support services as "read[ing] like the ruling of an agency exercising a power to regulate rates." 95 F.3d at 597. Cf. Pet. App. 117a n.35 (California Court of Appeal declining plaintiff's request that it assume "the role of a price control board").

Alternatively, the Seventh Circuit would have applied and upheld the agreement under the rule of reason. The Seventh Circuit would have understood that the creation of a county-wide MLS, though "reduc[ing] the number of independent decisionmakers" who controlled the terms of MLS services in San Diego County, nevertheless "may improve efficiency" by providing real estate agents with a superior product. 95 F.3d at 598. With its standardized property profile forms that help "preserve the integrity of the listing service" (see Pet. App. 59a) and "one stop service" for listings in a consolidated database, among other improved features, the joint venture's new county-wide MLS facilitated information exchange, increased output, and offered new efficiencies impossible before the integration. Because the allegedly unlawful agreement affected only the price of a new and concededly procompetitive product that none of the venturers individually did produce or could have produced, the Seventh Circuit would likely have upheld the agreement as lawful.

The conduct found per se unlawful in the Ninth Circuit is thus typical of activity that other circuits regard as potentially beneficial to consumers and competition and therefore refuse to condemn as unlawful per se.[6] In the First and Seventh

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[6] Other circuits may well have reached a similar conclusion. *See, e.g., SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994); *National Bancard Corp. (NaBanco)* v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986); *cf. Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986). Rather than rely on these cases, the panel below placed great weight on Ninth Circuit precedent that is hostile to procompetitive collaborations. *See* Pet. App. 18a (citing *Los Angeles*

Circuits, the pricing agreement challenged here would have been upheld either as within the discretion antitrust law accords a joint venture to set a price for inputs necessary to support a new product, or, at the very least, as on balance procompetitive under the rule of reason. The need to ensure uniform national application of the Sherman Act in an area of central importance to the national economy justifies this Court's plenary review.

2. Neither the DOJ nor the FTC would have objected to the challenged agreement as unlawful per se. In the preamble to their jointly issued *Collaboration Guidelines*, the Agencies recognize that "[c]ompetitive forces are driving firms toward complex collaborations" and that such collaborations "often are not only benign but procompetitive." Accordingly, "in the last two decades," the Agencies "have brought relatively few civil cases against competitor collaborations." Furthermore, the Agencies express concern that "a perception that antitrust laws are skeptical about [competitor] agreements among actual or potential competitors may deter the development of procompetitive collaborations."[7]

Mem'l Coliseum Comm'n. v. *National Football League*, 726 F.2d 1381 (9th Cir. 1984)); *see* 726 F.2d at 1406 (Williams, J., dissenting in part) (criticizing majority's rejection of the single entity defense, especially where the "distinct units" of an enterprise "are inextricably bound in an economic sense" and "cannot produce separate, individual goods or services absent coordination").

[7] Fed. Trade Comm'n & Dept. of Justice, *Antitrust Guidelines For Collaborations Among Competitors* 1 (Apr. 2000). *See* T. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1171-72 & nn.196-203 (2001) (showing that commentators believe "'antitrust joint venture law has been a morass of confusion and ambiguity,'" in which joint ventures "'receive[] a more hostile reception in the agencies and courts' than mergers" which eliminate competition entirely); *see id.* at 1172 (reporting observation by then-FTC Chairman Robert Pitofsky that "'uncertainties in enforcement policy (and law) have almost certainly blocked, delayed, or raised the cost of legitimate [joint ventures].'") (alteration in original). Notably, companies that do not abandon collaboration altogether will opt to merge,

The *Collaboration Guidelines* are intended to counter that perception. They make clear that where "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, *even if it is of a type* that might otherwise be considered per se illegal." *Guidelines* § 3.2, at 8 (emphasis added).

The joint venture here satisfies the definition in the *Guidelines* of an "efficiency-enhancing integration": "Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately." *Id.* The Agencies also recognize, contrary to the Ninth Circuit, that "[a]n agreement may be 'reasonably necessary' [to achieve the procompetitive benefits of the venture] without being essential," and consequently will "not search for a theoretically less restrictive alternative that was not practical given the business realities." *Id.* § 3.2, at 9.

The *Guidelines* nowhere rely upon this Court's decisions in *Topco* or *Sealy*, two heavily criticized joint-venture decisions that helped create anti-joint venture perceptions, and that the Ninth Circuit found to establish "principles" that controlled the decision here. Pet. App. 18a-19a. Equally important, the *Guidelines* treat the Court's decision in *Maricopa* as turning significantly on the finding that the challenged venture involved "no integration" of assets. *Guidelines* § 3.2, at 8-9 nn.18, 20. The Ninth Circuit, in contrast, viewed *Maricopa*

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even though less restrictive cooperative arrangements would enhance efficiency. *Id.* Here, for example, a full merger of the associations to create a county-wide MLS would not have been condemned as unlawful per se, and yet such a complete merger would have denied agents the benefit of competition between the associations for new members.

as controlling without regard to petitioners' undisputed integration of complementary assets.

Under the *Guidelines* then, the Agencies would have concluded that the support services agreement is not unlawful per se.[8] That is because petitioners integrated their unique listing assets into a new efficiency-enhancing product that no individual participant could have achieved separately, and because the challenged agreement relates to the pricing of a "necessary" part of that procompetitive product. Applying the *Guidelines*, the Agencies would have evaluated the agreement's merits under the rule of reason and acknowledged the venture's right to set a price for these required inputs for its new, procompetitive product. They would not have invoked *Topco*, *Sealy*, or *Maricopa* to condemn the agreement as unlawful per se.

Indeed, in its recent *Polygram* decision, the FTC understood its *Guidelines* and this Court's decision in *California Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999), to require the agency to consider "at some length" the "proffered justifications" for an agreement of competitors to "restrict competition by products wholly *outside* a joint venture." *Polygram Holding, Inc.*, No. 9298, slip op. at 41, 49 (F.T.C. July 24, 2003), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf. Lengthy consideration is warranted all the more here, where the agreement pertains to the price of inputs that are concededly necessary to the provision of the

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[8] *See, e.g.*, Antitrust Div., Dept. of Justice, 3G Patent Platform Partnership Business Review Letter 11 (Nov. 12, 2002) (joint patent evaluation and licensing process, including standardized royalty formulae, deemed acceptable under rule of reason, where restraints were justified by "their relationship to an integration of complementary resources"), *available at* http://www.usdoj.gov/atr/public/busreview/200455.pdf; Antitrust Div., Dept. of Justice, Toshiba-Time Warner DVD Business Review Letter 13 (June 10, 1999) ("royalty-allocation formula" not unlawful per se), *available at* http://www.usdoj.gov/atr/public/busreview/2485.pdf.

same new product that the joint venture itself was uniquely able to create.[9]

The Ninth Circuit's opinion reinforces the "perception" that the antitrust laws remain hostile to genuine, efficiency-enhancing competitor collaborations. That is the very perception that the federal antitrust Agencies now seek, through their *Guidelines*, to dispel. Only this Court can provide the definitive guidance that is needed.

3. The conflicts discussed above reflect longstanding tension in this Court's joint venture cases. Two of this Court's leading joint venture cases – *Topco* and *Maricopa* – are inconsistent with the third leading case – *BMI* – and with the trend away from per se analysis in many of the Court's subsequent non-joint-venture decisions.

In *Topco*, the Court applied the per se rule to invalidate an agreement among small grocery store chains to allocate the territories in which they would market the private-label goods to which their joint venture gave them access. The Court has since relied upon *Topco* to confirm that naked agreements among horizontal competitors to allocate territories are per se unlawful. *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam).

But the Court appeared to go further in *Topco*. It applied the per se rule notwithstanding Topco's argument that its joint venture "could not exist if the territorial divisions were anything but exclusive," and that the joint venture "increases competition by enabling its members to compete successfully with larger regional and national chains." 405 U.S. at 605. The Court's opinion can be read to reject such a

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[9] By contrast, the decision below fails to distinguish, or even acknowledge, this Court's decision in *California Dental Assoc.* v. *FTC*, 526 U.S. 756 (1999), which overturned the Ninth Circuit's "quick look" determination under Section 1 and held that the competitive effects of an advertising restraint imposed by a professional association must be analyzed more thoroughly under the rule of reason. *Id.* at 759.

justification – even assuming its assertions could be proven true – on the ground that it is for Congress, not the courts, to modify the application of the "rigid" per se rule, even when it operates to stifle rather than promote competition. *Id.* at 608-12.

This broader aspect of *Topco* is not discussed in the *Guidelines* or in some court of appeals decisions that insist upon rule of reason treatment for agreements that are part of legitimate joint ventures. But other courts have expressly concluded that this broader aspect of *Topco* has been "effectively overruled." See, *e.g.*, *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986) ("to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled"); *Massachusetts Food Ass'n* v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 n.2 (1st Cir. 1999) ("*Topco* may no longer be good law for its broader proposition that such a restraint is condemned *per se* even where it is ancillary to a productive joint venture"). Leading commentators also have convincingly demonstrated that *Topco*'s per se condemnation of an agreement that partly restrained *only* the very competition that the joint venture itself created is illogical, and that *Topco*, at least on this point, was wrongly decided.[10] Yet this Court has never disavowed or distinguished this

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[10] *See, e.g.*, G. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 710-11 (1998) (criticizing *Topco* because "[p]er se treatment is not appropriate for a restraint on competition created by a joint venture"); 13 H. Hovenkamp, *Antitrust Law* ¶ 2134c2, at 164 (1999) (under *Topco*'s reasoning, "even the most unambiguously procompetitive joint venture would have to be considered illegal, for ventures typically impose restrictions on the participants' venture output"); *cf.* T. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 Antitrust L.J. 773, 796 (1998) ("*Topco*'s rejection of economic analysis is antithetical to the modern antitrust jurisprudence that began shortly after *Topco*.").

aspect of *Topco*, which the Ninth Circuit effectively enforced in the decision below.

BMI and *Maricopa* exacerbate the uncertainty. At issue in *BMI* was a blanket license to thousands of copyrighted songs created through a joint venture of copyright owners. The United States advised (as *amicus*), and the Court unanimously concurred, that the blanket license was a procompetitive new product, and that the literal price-fixing necessary to create it should not be condemned per se.

BMI implicitly signaled a shift away from *Topco*'s assertion that in cases of horizontal restraints, courts must "rigid[ly]" enforce the per se rule regardless of the competitive merits. But in *Maricopa*, a divided Court (4-3) reversed course. The Court struck down as unlawful per se an agreement among physicians to set a maximum fee for their services to subscribers to a health plan. The Court found that even if fee schedules provided "a uniquely desirable form of insurance coverage that could not otherwise exist," such price agreements between competitors were unlawful per se, because it was "not necessary that the doctors do the price fixing." 457 U.S. at 351-52. The Court cited *Topco* approvingly for the proposition that any change in the application of the per se rule must come from Congress. *Id.* at 354-55. And the Court distinguished *BMI* at length, observing (as noted in the *Guidelines*) that the *Maricopa* venture did not involve the integration of physician assets. *Id.* at 356.

The dissenters in *Maricopa* "would have expected [the Court] to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this." *Id.* at 364 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting). And the dissenters also found the "effort to distinguish *Broadcast Music* . . . unconvincing" because, in the dissenters' view, "each arrangement apparently makes possible a new product

by reaping otherwise unattainable efficiencies." *Id.* at 365. In light of *Maricopa*, it is not surprising that the Ninth Circuit viewed *BMI* as limited to the narrow situation (possibly unique to blanket licenses) where the new product is, in its essence, a jointly agreed-to price.

Since *Maricopa*, however, the Court has repeatedly held, in other contexts, that courts should resist using the per se rule to condemn conduct that may be procompetitive if evaluated under the rule of reason. See, *e.g.*, *California Dental*, 526 U.S. at 769-81 (vacating Ninth Circuit's "quick look" analysis for "a fuller consideration" under the rule of reason); *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) (overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), and holding that vertical maximum price-fixing is subject to rule of reason rather than unlawful per se); *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 724-25 (1988) (rule of reason, not per se rule, applies to vertical non-price restraints); *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) (unanimously reversing Ninth Circuit's decision that "applied *per se* analysis inappropriately" to an alleged group boycott).[11]

But since *Maricopa*, the Court has not revisited the role of per se analysis in evaluating the horizontal pricing agreements that routinely arise with legitimate joint ventures. Indeed, as Professor Louis observed over 20 years ago, even *BMI* alone did not provide the clarity needed, because *BMI* does not

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[11] In *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85 (1984), the Court held that the rule of reason applied to a horizontal restraint among competitors, but not as a general principle of joint venture analysis. Rather, what was "critical is that this case involves an *industry* in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101 (emphasis added); *see* Pet. App. 22a (quoting this same limiting language). The Court then noted the "likelihood" that the per se rule would continue to apply "without inquiry into the special characteristics of a particular industry," and cited *Maricopa*. 468 U.S. at 100 n.21.

"distinguish *Topco* and does not hold that ancillary restraints should generally be analyzed under the rule of reason. Achievement of that seemingly inevitable result will require one more decision."[12] Yet in *Maricopa*, the Court turned away from the "inevitable result" to which *BMI* had rightly pointed.

This case is an appropriate vehicle for this Court to use in taking that step. The relevant facts here are straightforward and undisputed. The Ninth Circuit's application of the per se rule to condemn the same agreement that the district court and California Court of Appeal found to be lawful is egregiously wrong. The decision leaves petitioners and other businesses without meaningful guidance for lawful collaboration. For example, it is difficult to imagine how antitrust lawyers could now prudently advise a client to move forward with a legitimate joint venture that required the venturers to agree upon a price for some aspect of the necessary support or distribution of the new product without running a significant risk of serving up the client's "head on a silver platter."

The true "roadkill" of the Ninth Circuit opinion, therefore, will be the lost procompetitive benefits of abandoned joint ventures. As the Agencies have recognized, the Sherman Act should not deter beneficial collaboration. This Court should dispel the perception – reinforced with relish by the court of appeals – that participants in a legitimate joint venture remain vulnerable to per se attacks even for agreements on the price of services necessary to support their new products. The Court should reject the Ninth Circuit's per se ruling, resolve the circuit conflict and the tension within its prior cases, and hold that the pricing agreement challenged here did not violate Section 1.

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[12] M. B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music*?*, 66 Va. L. Rev. 879, 899 (1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 22, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 01-56199, 01-56231.

ARLEEN FREEMAN, individually and on behalf of all others similarly situated; James Alexander, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

EDWARD Y. URATA, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SAN DIEGO ASSOCIATION OF REALTORS; North San Diego County Association of Realtors; Pacific Southwest Association of Realtors, Inc.; East San Diego County Association of Realtors; Coronado Association of Realtors; Sandicor, Inc.; Michael Spilger; Greg Britton; Joel Forrel; Gwen Hovland; Aileen Oya; Marty Conrad; Lauren Reiser; Anita Alkire; Phyllis Gritts; Chris H. Lewis; Lou Ann Williams; Cory Shepard; Sara Brown; Joyce V. Amick; Jerry Scantlin; Walter Baczkowski; Mark Marchand; Stephen Games; California Association of Realtors,

Defendants-Appellees.

ARLEEN FREEMAN, individually and on behalf of all others similarly situated; James Alexander, individually and on behalf of all others similarly situated; Edward Y. Urata, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

SAN DIEGO ASSOCIATION OF REALTORS; North San Diego County Association of Realtors; Pacific Southwest Association of Realtors, Inc.; East San Diego County Association of Realtors; Coronado Association of Realtors; Sandicor, Inc.; Anita Alkire; California Association of Realtors,

Defendants-Appellants,

and

MICHAEL SPILGER; Greg Britton; Joel Forrel; Gwen Hovland; Aileen Oya; Marty Conrad; Lauren Reiser; Phyllis Gritts; Chris H. Lewis; Lou Ann Williams; Cory Shepard; Sara Brown; Joyce V. Amick; Jerry Scantlin; Walter Baczkowski; Mark Marchand; Stephen Games,

Defendants.

Argued and Submitted July 9, 2002
Filed March 10, 2003

Before KOZINSKI and FERNANDEZ, Circuit Judges, and KING,* District Judge.

OPINION

KOZINSKI, Circuit Judge:

Competition is the mainspring of a capitalist economy. Sometimes, however, cooperation can make markets more efficient; setting industry standards and pooling market data are two examples of arrangements that often benefit consumers. Antitrust laws acknowledge these benefits, but still treat the arrangements with skepticism, for seemingly benign agreements may conceal highly anticompetitive schemes. We apply these principles to a case involving a real estate Multiple Listing Service.

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Background [1]

Real estate agents make a living matching buyers and sellers. Up-to-date information about properties on the market is a must. Long gone are the days when agents trawled the neighborhood on horseback in search of telltale "For Sale" signs. We're now in the era of the Multiple Listing Service, or "MLS," which lets agents share information about properties on the market with the help of a computerized database. Agents who subscribe to the MLS can peruse the listings of other subscribers and post their own.[2]

Care and feeding of an MLS involves more than just maintaining a database. Someone must enroll new MLS subscribers, bill and collect payments, ensure that postings comply with guidelines and provide support staff to answer subscribers' questions. These "support services" are part of the necessary overhead of delivering an MLS.

Before 1992, twelve MLSs served San Diego County, each operated by a different real estate trade association serving subscribers in a particular region of the county. Some of these MLSs shared common databases of listings. The direct cost of maintaining each database was allocated among the associations using it. The associations each provided their own support services, which varied from one to the next, and they all set the prices they charged agents independently. There were four different MLS databases in total, so a real estate agent who wanted access to all properties in San Diego County had to subscribe to more than one MLS.

Eleven of the twelve MLS operators were local Associations of Realtors, professional groups with ties to the

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[1] The facts we describe are uncontested unless otherwise noted.

[2] State law and industry practice distinguish between "brokers" and "salespersons." We use the term "agents" throughout as a generic placeholder for real estate professionals who are typical MLS subscribers.

California Association of Realtors (CAR) and the National Association of Realtors (NAR).[3] The Associations of Realtors provide many services in addition to MLS database access and support services to their real estate agent members. Under state law, however, they are required to offer MLS subscriptions to members and nonmembers alike. *See Marin County Bd. of Realtors v. Palsson*, 16 Cal.3d 920, 937-38, 130 Cal.Rptr. 1, 549 P.2d 833 (1976).

In 1990-91, these eleven associations decided to combine their databases. Not only would this give their agents access to all San Diego County properties through a single MLS, it would reduce operating costs because there would only be one database to maintain. Representatives met and decided to create a new entity called Sandicor with a single MLS database covering all of San Diego County. They considered it vital, though, that individual associations continue to provide local support services for the MLS. Comparing financials, they discovered that the associations' costs of providing services varied widely. The largest, San Diego Association of Realtors (SDAR), spent only $10 per subscriber per month, while two of the smallest, Fallbrook and Valley Center, spent close to $50.

The representatives considered two different business models on which to operate the new common database. The first was a "decentralized" arrangement in which each association would pay its share of the database costs but determine its own support service and pricing policies. The smaller associations balked at this proposal, fearing that SDAR would undercut their prices and threaten their viability. The representatives responded by adopting the current "centralized" business model instead.

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[3] The other association was unaffiliated and didn't participate in any of the arrangements at issue in this case.

In this model, Sandicor is a corporation, and the associations own its shares and appoint its directors. The associations operate under service agreements with Sandicor that outline in general terms the support services they must perform for subscribers. Associations sign up new MLS subscribers and collect MLS fees from subscribers on Sandicor's behalf, but Sandicor determines the fee agents must pay to subscribe. Associations are prohibited from discounting Sandicor's MLS fee or crediting any portion of it against other purchases. The service agreements between Sandicor and the associations specify a support fee that Sandicor pays each association in return for the support services the association provides to subscribers. Thus, subscribers don't pay the associations for support services directly; they pay only Sandicor's MLS fee, and Sandicor then returns part of that fee as a support fee to the associations. The support fee, like the MLS fee, is assessed on a per-subscriber basis.[4]

The associations originally set the support fee at $25 per subscriber per month.[5] This was much higher than SDAR's $10 costs but also considerably lower than Fallbrook's and Valley Center's $50 costs. This meant that Fallbrook and Valley Center would provide services to their subscribers at a loss. To make up the shortfall, the other associations agreed to pay them fixed monthly cash subsidies.

Defendants explain that this centralized model was "a fundamental matter for survival" because the smaller associations needed assurance that they could "continue to operate service centers as they had in the past and that the revenues

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[4] Although Sandicor has experimented with different pricing policies, at most relevant times it charged fees based on the number of individuals who used the MLS. Thus, a real estate office with four agents using the MLS would pay four subscription fees.

[5] The fee has varied somewhat over the years but remains at approximately the same level.

they had received from MLS services would continue to be available." If Sandicor had adopted a decentralized format, "the far larger San Diego Association of Realtors . . . would undoubtedly have been able to offer different prices to MLS users than would Fallbrook," which would have "threatened the future viability of local service centers." Without the revenue guaranteed by the fixed support fee, "the smaller Associations would not have joined," and Sandicor would not have had a "truly regional MLS."

Plaintiffs' Suit and Proceedings Below

Arleen Freeman and James Alexander are San Diego County real estate agents who subscribe to Sandicor's MLS. They have no quarrel with Sandicor's monopoly of the MLS database itself, recognizing that the single countywide database offers substantial overall benefits to consumers. They claim, however, that the price of Sandicor's MLS is inflated because the support fees Sandicor pays the associations are fixed at a supracompetitive level. For example, although SDAR may spend only $10 per subscriber per month to provide support services,[6] it receives more than twice that from Sandicor under its service agreement. As a result, plaintiffs claim, SDAR has made millions of dollars from inflated support fees. Real estate agents allegedly suffer because Sandicor passes on these higher support fees in the form of higher MLS fees. Plaintiffs allege that, by fixing support fees in the service agreements, defendants violated section 1 of the Sherman Act, which bars "[e]very contract . . . or conspiracy[ ] in restraint of trade or commerce among the several States." 15 U.S.C. § 1.

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[6] Ten dollars is the figure quoted at the 1991 meeting; plaintiffs claim that SDAR's cost of providing support services is actually much less. It is unclear from the briefing and record whether the $10 figure also included SDAR's share of the MLS database costs.

Plaintiff Freeman also sent a letter to Sandicor in which she proposed to operate a service center that would provide Sandicor's MLS to subscribers. She claimed she could provide support services at a much lower price than the associations. Sandicor declined. Freeman believes Sandicor refuses to authorize new MLS support service providers for anticompetitive reasons, and that restrictive provisions in Sandicor's shareholders' agreement allow the associations to veto new sources of competition. Defendants respond that Sandicor refused the request because it was an obvious litigation ploy rather than a bona fide proposal. Plaintiffs nonetheless claim that the associations violated section 2 of the Sherman Act by conspiring to monopolize the market for support services. 15 U.S.C. § 2.[7]

Plaintiffs filed a class action in federal court seeking an injunction and damages in excess of $10 million, naming as defendants Sandicor, the associations, the California Association of Realtors and assorted officers and directors of these organizations.[8] The district court refused to certify the class,

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[7] Plaintiffs' briefs argue both monopolization and conspiracy to monopolize theories, but the Second Amended Complaint alleges only the conspiracy claim in the market for support services. Second Amended Complaint ¶¶ 158-160. The complaint also alleges monopolization and conspiracy to monopolize in the MLS market itself, *id.* ¶¶ 161-168, but plaintiffs abandoned arguments related to that market on appeal.

[8] Plaintiffs had earlier sued in California state court for violations of state antitrust law. The trial court dismissed the suit on the pleadings, and the court of appeal affirmed. *Freeman v. San Diego Ass'n of Realtors*, 77 Cal.App.4th 171, 91 Cal.Rptr.2d 534 (1999). Defendants rely on the state decision as persuasive authority but do not contend that it has preclusive effects on plaintiffs' federal claims. The state suit has no res judicata effect because federal courts have exclusive jurisdiction and California doesn't apply res judicata to claims the first forum was incompetent to hear. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379, 382, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985); *Pension Trust Fund for Operating Eng'rs v. Triple A Mach. Shop, Inc.*, 942 F.2d 1457, 1460 (9th Cir.1991). The suit also has no relevant issue preclusive effects here

dismissed the claims against essentially all the directors and officers, and dismissed certain other claims as abandoned. None of those decisions is before us.[9]

Following discovery, both sides moved for summary judgment. Defendants argued that their conduct had no substantial effect on interstate commerce and that they were immune from section 1 because they were a single entity under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). The district court rejected the first defense but sustained the second, holding that the associations were "not separate entities pursuing separate interests that conspired to create Sandicor." It also found that Sandicor didn't "buy" anything from the associations, holding that "the [associations] do not sell service center functions to Sandicor, but rather provide Sandicor's MLS to users."

Both sides appeal. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337. We have jurisdiction under 28 U.S.C. § 1291, and, except as noted below, we review de novo, *Morrison v. Hall*, 261 F.3d 896, 900 (9th Cir.2001).

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because the pertinent issues are not "identical." *Lucido v. Superior Court*, 51 Cal.3d 335, 341, 272 Cal.Rptr. 767, 795 P.2d 1223 (1990). The state suit challenged different conduct—namely, an alleged conspiracy to fix Sandicor's MLS fee. The state court's single-entity analysis is thus not preclusive, because it was based in part on the nature of the price-fixing allegation. *See Freeman*, 77 Cal.App.4th at 192-94 & n. 21, 91 Cal. Rptr.2d 534. Moreover, because the state suit was dismissed on the pleadings, we doubt that it has any issue preclusive effects in this case at all. The purely legal issue of the sufficiency of the claims under California law is not identical to the federal issues here. *See id.* at 183 n. 9, 91 Cal.Rptr.2d 534 (noting that the Cartwright and Sherman Acts are "not coextensive"). The state suit is, of course, res judicata as to plaintiffs' pendent state law claims. The district court dismissed those claims under 28 U.S.C. § 1367, and plaintiffs haven't asked us to revive them.

[9] The only remaining individual defendant was Anita Alkire, who filed for bankruptcy during the proceedings. Plaintiffs have abandoned their claims against her.

Interstate Commerce

The Sherman Act applies to restraints of trade or commerce "among the several States." 15 U.S.C. §§ 1-2. Monopolizing the local lemonade stand doesn't get you into federal court. To make a federal case, a plaintiff must show that the activities in question, although conducted within a state, have a "substantial effect on interstate commerce." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). Uncontradicted evidence shows that Sandicor's MLS mediated more than $23 billion of home sales over a four-year period, affecting approximately $10 billion in interstate home-mortgage financing. The effects of home sales on the interstate mortgage market are a sufficient connection with interstate commerce, *see id.* at 246, 100 S.Ct. 502, and $10 billion is "substantial" by any standard.

Defendants urge that we consider only the interstate effects caused by the illegal conduct itself. According to their economics expert, the cost of an MLS subscription is trivial compared to the typical real estate sales commission. Thus, even if the cost of the MLS was inflated, it would have only a de minimis effect on the commissions real estate agents charge, and thus no effect on the number of houses sold. Defendants misunderstand the legal standard. The Supreme Court has explained:

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' ["infected"] activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix [prices], or by those other aspects of respondents' activity that are alleged to be unlawful.

Id. at 242-43, 100 S.Ct. 502; *see also Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331, 111 S.Ct. 1842, 114 L.Ed.2d 366

(1991) (reaffirming this standard). *McLain* tells us to look at the infected activities, not the infection. Thus, we examine the MLS, not the alleged price fixing. Even if the price of the MLS has no substantial effect on interstate commerce, the MLS itself does. Defendants' economist may be right, but he answered the wrong question.

Defendants perceive a split in Ninth Circuit authority between cases applying the infected activities test and those considering a defendant's "'general business' activities." *See Mitchell v. Frank R. Howard Mem'l Hosp.*, 853 F.2d 762, 764 n. 1 (9th Cir.1988) (citing *W. Waste Serv. Sys. v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.1980)). Neither flavor helps defendants; what they want is the "illegal conduct" test that *McLain* rejected. And that, we are not at liberty to provide.

Price Fixing

1. No antitrust violation is more abominated than the agreement to fix prices.[10] With few exceptions, ' price-fixing agreements are unlawful *per se* under the Sherman Act and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.'" *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 345, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S.Ct. 811, 84 L.Ed. 1129 (1940)). The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred.

None of the relevant facts is disputed. Prior to 1992, the associations made independent decisions about how to price their support services, even though many of them shared

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[10] One manual captures the principle nicely in question and answer format: "[Q.] May competitors agree to fix prices? [A.] Duh. What do you think?" Eliot G. Disner, *Antitrust Law for Business Lawyers* § 4.06, at 82 (2001).

common databases. When they decided to form a countywide database, they debated whether to continue that system of independent pricing or to set a fixed, uniform fee that they would receive for providing support services. They opted for the latter arrangement and selected a fee that was more than double the cost of the most efficient association. They admit that they fixed the fee in order to ensure that financially weaker associations would make more money than under a competitive regime, and thus concede by implication that they intentionally fixed the fee at a supracompetitive level.

The district court nonetheless rejected plaintiffs' theory of the case because it was not convinced that the associations sold anything to Sandicor. The court explained that "[a] review of the Service Center Agreements . . . reveals the Associations do not sell service center functions to Sandicor, but rather provide Sandicor's MLS to users." The terms of the service agreements, however, are unambiguous: "The Association will provide the following [support] services to SANDICOR MLS participants," Service Agreement ¶ 1; "[i]n consideration of the above services, SANDICOR will pay to the Association the fees itemized on Schedule A," *id.* ¶ 2. Sandicor is paying for *something*. What it's buying is the contractual right to have the associations provide support services to its MLS subscribers. That the subscribers receive the support services as third-party beneficiaries doesn't change the fact that Sandicor is the buyer and the associations are the sellers. *Cf. FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (treating the government as the "customer" when it pays for representation of indigent criminal defendants). If Elle Woods pays someone to walk her dog, she's the buyer and the dog-walker is the seller, even though Bruiser gets the exercise. And if the Cambridge dog-walking cartel starts fixing prices, it's hardly a defense for them to say "We just walk dogs!"

Sandicor charges subscribers for their use of the MLS; its MLS fee includes the support services provided by the associations. The support fee Sandicor in turn pays the associations for support services was fixed at a level more than twice what it cost the most efficient association to provide them. These inflated support fees harm subscribers if Sandicor passes them on in the form of higher MLS fees. The district court found that "there is no evidence . . . [that Sandicor] passes on an inflated price to consumers." This finding is contrary to the record.

There is unmistakable evidence that Sandicor not only considered its costs in setting MLS fees but, in fact, priced near cost and thus may have passed on the inflated support fees almost dollar for dollar. For example, an April 1997 association bulletin explains that "[Sandicor's] pricing takes the total amount required to run Sandicor and divides by the total number of agents on the system. The amount to run Sandicor includes . . . the amount Sandicor sends back to each Association, by contractual arrangement, to provide you with local service." North San Diego County Ass'n of Realtors, *Sandicor Board of Directors Approves Per Capita Fee Structure*, Service Center Supplement, Apr. 1997, at 1, E.R. at 441 (emphasis omitted). Other materials in the record are to the same effect. *See, e.g.*, Letter from William C. Stegall, President/CEO of Sandicor (June 20, 1997), E.R. at 454 (stating that Sandicor would study ways in which "costs can be reduced" so that it could sell MLS at the "lowest possible cost in the future for all of our consumers"); San Diego Ass'n of Realtors, *M.L.S.—Why $27 Per Month*? (Jan. 3, 1992), E.R. at 256 ("[Sandicor's MLS] price was determined by the lowest possible cost to users. . . ."). This evidence is sufficient to show that Sandicor's prices reflected its costs to some extent and thus that an inflated support fee injured plaintiffs. In contrast, the record does not support the counterintuitive

claim that Sandicor is some sort of accounting pyrrhonist that sets its prices in utter disregard of its costs of doing business.[11]

That a purchaser suffers higher prices from passed-on costs doesn't necessarily mean he can sue. *Illinois Brick* denies standing to indirect purchasers in many circumstances. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). This rule has exceptions, however—two of which apply here. First, *Illinois Brick* doesn't apply to equitable relief, *see Lucas Auto. Eng'g, Inc. v. Bridgestone/ Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir.1998), which is one of the remedies plaintiffs seek. Second, indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation. *See Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir.1980). The associations own Sandicor. They appoint its board of directors, and they are accused of conspiring with it. There's no realistic possibility Sandicor will sue them.[12]

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[11] A firm will normally pass on some portion of its cost-per-unit savings to consumers even if it is a profit-maximizing monopolist. This has nothing to do with altruism; a monopolist just makes more money by reducing its price in response to a cost decline and thus selling to more consumers. *See* Richard A. Posner, *Antitrust Law: An Economic Perspective* 248 (1976) ("[I]f the monopolist's marginal cost declines (other things being the same), he will reduce his price. . . ."). The theoretical economics of this case are more nuanced because the associations are shareholders of Sandicor. They could conceivably induce Sandicor to set MLS fees at a level that maximizes shareholder profits (dividends plus support fees) rather than its own. The level of support fees might then be less relevant (except perhaps as a device to make the MLS look less profitable than it really is). The record contains no evidence that Sandicor ever set MLS prices in this fashion, however. Instead, it indicates that Sandicor set prices based on costs.

[12] Defendants argue that an indirect purchaser who proves it can sue under *Illinois Brick* because of a unity of interest necessarily proves that it can't sue under *Copperweld* because of the very same unity of interest.

Were we to grant immunity from section 1 merely because defendants nominally sell services through another entity rather than to consumers directly, we would risk opening a major loophole for resale price maintenance and retailer collusion. Consider the following: Ford can't sell cars to its dealers wholesale for $20,000 and require them to mark up the price exactly $4000 before reselling them to the public—that would be resale price maintenance, a per se violation of section 1. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) (citing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)). Nor can the dealers collude among themselves to peg the retail markup at $4000. *See Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 134 (9th Cir.1960). Can Ford and its dealers circumvent these prohibitions by agreeing that the dealers, while continuing to bear the same economic risks, will nominally sell the cars on Ford's behalf for $24,000 and receive a $4000 "reimbursement" from Ford for each car sold? We think not. Yet this is in material respects analogous to what Sandicor and the associations did here. Sandicor charges MLS subscribers $44 per month; an association collects this fee from each subscriber and hands it over to Sandicor, which then returns $22.50 to the association as the support fee.[13] But the association might as well simply collect $44, send $21.50 to Sandicor and keep the other $22.50 for itself; defendants' counsel forthrightly conceded that "economically, it could be described either way." For that matter, the associations could purchase MLS database access from

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This argument is clever but unpersuasive. *Copperweld* looks at whether the defendants are commonly *owned*, not at whether they commonly *own* some other entity. *Royal Printing*, on the other hand, doesn't care who owns whom in the distribution chain. Thus, *Copperweld* doesn't apply here (as we will see) because the associations are independently owned, but *Royal Printing* applies because the associations own Sandicor.

[13] These figures reflect 1999 MLS and support fees.

Sandicor for $21.50 on an as-needed basis and then agree among themselves to resell it with support services for exactly $22.50 more—again, there's no practical economic difference. Defendants can't turn a horizontal agreement to fix prices into something innocuous just by changing the way they keep their books.[14]

The discount ban, while not necessary to our finding of a section 1 violation, certainly supports our conclusion. Agreements not to offer discounts are per se violations of section 1. *Catalano, Inc. v. Target Sales,* 446 U.S. 643, 648, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (per curiam). If associations were permitted to refund part of Sandicor's MLS fee to subscribers, they could compete on price notwithstanding the contractually fixed support fee.[15] Without the ban, the price-fixing structure might well have collapsed. We can conceive of no legitimate justification for it, and defendants have offered none.

No one doubts that Sandicor and the associations may set policies necessary to maintain the MLS database. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir.1980) (allowing an MLS operator to enforce "reasonably

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[14] The district court rejected the section 1 claim in part because the associations' support services and MLS database access were not "separate and distinct products or services" with "separate markets." It relied heavily on tying concepts. Distinct product markets are crucial to a tying claim, but they are largely irrelevant to a price-fixing claim. Many forms of price fixing, for example, involve retail services that are obviously inseparable from the product itself. *See, e.g., Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Plymouth Dealers*, 279 F.2d at 134. That the retail services can legally be tied to the product doesn't mean that retailers can agree to fix prices.

[15] A refund of part of Sandicor's MLS fee from an association to an agent is equivalent to a reduction in the support fee that Sandicor pays the association coupled with a reduction in the MLS fee that the agent pays Sandicor.

ancillary restraints"). Obviously, for example, they can dictate standards for data entry. Sandicor also retains considerable freedom to specify services that the associations must provide. *Cf. Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). But this flexibility does not extend to what the associations did here.

The associations engaged in price fixing, and plaintiffs have standing to sue them. The associations purposely fixed the support fee they charged Sandicor at a supracompetitive level.[16] Sandicor passed on some portion of that inflated support fee to agents, who paid higher prices for the MLS as a result. This is precisely the type of injury the antitrust laws are designed to prevent.

2. Defendants argue that they are immune from section 1 because they constitute a "single entity" and are thus incapable of conspiring with one another. Section 1, like the tango, requires multiplicity: A company cannot conspire with itself. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). If two erstwhile competitors combine to become a single economic entity—by merger or acquisition, for example—the act of combination may violate the antitrust laws, but their subsequent relations are generally immune from section 1.

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[16] Plaintiffs claim several other instances of price fixing. Sandicor's board of directors, which is made up of association representatives, fixed the associations' retail prices on books, "tour inputs," computer assistance by association staff, and lockboxes and replacement keypads. Defendants question plaintiffs' standing to challenge these practices, observing that they did not specifically allege having purchased these products and services. We leave the issue for the district court to resolve on remand. Plaintiffs further challenge Sandicor's policy of mandating "uniform" support services and a standardized splash screen. These are nonprice restraints subject to rule-of-reason analysis. *See Cont'l T.V.*, 433 U.S. at 59, 97 S.Ct. 2549. We leave them for the district court to consider in the first instance as well.

The single-entity rule is relevant in a variety of contexts. It applies to a company and its officers, employees and wholly owned subsidiaries. *Id.* at 769, 771, 104 S.Ct. 2731. It also applies to subsidiaries controlled by a common parent, *Thomsen v. W. Elec. Co.*, 680 F.2d 1263, 1265-66 (9th Cir.1982), firms owned by the same person, *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 616, 618 (9th Cir.1979), and a firm owned by a subset of the owners of another, *Copperweld*, 467 U.S. at 773 n. 21, 104 S.Ct. 2731 (citing *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962)). It applies to principal-agent relationships, *Calculators Haw., Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1336 (9th Cir.1983), and to "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Maricopa County Med. Soc'y*, 457 U.S. at 356, 102 S.Ct. 2466; *see also Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1029 n. 5 (9th Cir.1988). The theme in these cases is economic unity. Where there is substantial common ownership, a fiduciary obligation to act for another entity's economic benefit or an agreement to divide profits and losses, individual firms function as an economic unit and are generally treated as a single entity.

Some decisions have found a single entity even in the absence of economic unity. In *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir.1988), the Eighth Circuit held that a joint venture of independently owned regional electric cooperatives was a single entity. *Id.* at 271. It opined that "legally distinct entities cannot conspire among themselves if they 'pursue[ ] the common interests of the whole rather than interests separate from those of the [group] itself.'" *Id.* at 274 (quoting *Copperweld*, 467 U.S. at 770, 104 S.Ct. 2731). Crucially, though, there was no evidence that "defendants are, or have been, actual or potential competitors." *Id.* at 276. Similarly,

Williams v. I.B. Fischer Nevada, 794 F.Supp. 1026 (D.Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir.1993) (per curiam), found that a fast food franchisor and its franchisees were a single entity; among other things, the franchisees were located too far apart to be effective competitors, even though they could vary their prices. *See id.* at 1031.

On the other hand, in *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir.1984), we held that the teams of the NFL are not a single entity.[17] We noted that "[t]he member clubs are all independently owned," *id.* at 1389-90, and that "profits and losses are not shared," *id.* at 1390. We further observed that "the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel." *Id.* This competitive element distinguishes *Los Angeles Memorial Coliseum* from cases like *Mt. Pleasant* and *Williams.*

Although the single-entity inquiry is fact-specific, *Williams*, 999 F.2d at 447, a few general guidelines emerge. First, in the absence of economic unity, the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity. "[A] commonality of interest exists in every cartel." *L.A. Mem'l Coliseum*, 726 F.2d at 1389. Retailers have a common interest in distributing a supplier's product, but they certainly are not exempt from section 1. *See Plymouth Dealers*, 279 F.2d at 134. And, the Court routinely scrutinizes joint ventures that involve aspects of common interest. *See, e.g., NCAA v. Bd. of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979); *United States v. Topco Assocs.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972);

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[17] *Los Angeles Memorial Coliseum* was decided before *Copperweld*, but nothing in the latter impugns our holding in the former.

United States v. Sealy, Inc., 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); *see also* 1 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 11.02[2], at 11-17 (2d ed.2000) (noting that cases finding joint venturers to be incapable of conspiracy are the "exception").

Second, in the absence of economic unity, the fact that firms are not actual competitors is also usually not enough, by itself, to render them a single entity. Absence of actual competition may simply be a manifestation of the anti-competitive agreement itself, as where firms conspire to divide the market. *See Maricopa County Med. Soc'y*, 457 U.S. at 344 n. 15, 102 S.Ct. 2466 (division of markets is per se illegal). Cases have required instead that the constituent entities be neither actual nor *potential* competitors, *City of Mt. Pleasant*, 838 F.2d at 276, *cf. Williams*, 794 F.Supp. at 1031.

Finally, where firms are not an economic unit and are at least potential competitors, they are usually not a single entity for antitrust purposes. This rough guideline fairly captures the holdings of the cases above.

These principles resolve the issue here.[18] The associations do not function as an economic unit in providing support services. Sandicor is a corporation, so agreements wholly internal to the company and its officers and employees are presumably immune.[19] But the agreements at issue extend beyond Sandicor to its shareholder associations contracting

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[18] We may resolve the issue of capacity to conspire because the relevant facts are not disputed. *See L.A. Mem'l Coliseum*, 726 F.2d at 1387.

[19] We assume this to be the case, although we do note that each association's ownership interest in Sandicor is automatically adjusted every year to reflect the relative number of subscribers it serves, so that the associations have eliminated many of the elements of risk-sharing traditionally associated with the corporate form.

on their own accounts. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir.2002) ("That a stockholder may be insulated by *Copperweld* when making ordinary governance decisions does not mean automatic protection when the stockholder is also an entrepreneur separately contracting with the company."). The associations have no substantial common ownership; they are mutual benefit corporations independently owned by their respective members. Their profits thus don't all wind up under the same corporate mattress. Even assuming that the associations act as Sandicor's "agents" for some purposes, their decision to fix the price of the support services they sell to Sandicor at a supracompetitive level—services on which the associations bear the economic risk—was not an exercise of agency authority on Sandicor's behalf. *Cf. Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1450 (9th Cir.1988). Nor do the associations share profits among themselves; Sandicor pays support fees on a per-subscriber basis, so an association's revenues are tied to the number of agents it signs up. An association that attracts lots of agents doesn't share the fruits of that industry with one that attracts few.

The associations are also at least potential competitors. Nothing innate in the economics of a countywide MLS requires an agent to subscribe through one association rather than another. Because Sandicor pays support fees on a per-subscriber basis, competition among associations to sign up new MLS subscribers is also competition in the market to sell support services to Sandicor. The more subscribers an association signs up, the more support services it sells to Sandicor. If one association offered better support services—longer hours, a nicer building, more patient help staff—it could attract more subscribers.

The associations are also now *actual* competitors. Before 1994, rules of the National Association of Realtors required an agent to join the association in the geographical area where

the agent's office was located. But that year NAR adopted the "board of choice" system, which allows agents to choose their association. Under board of choice, the associations compete for members.[20] SDAR, for example, sent letters to other associations' members offering free trials. Another association considered using flyers and a presentation to retain or attract members in response to board of choice. Agents could consider an association's MLS support services in deciding whether to become a member; at a minimum, those services are part of the total package that an association offers.[21]

Defendants sabotage their theory by their own admissions. They concede they fixed support fees in part because SDAR "would undoubtedly have been able to offer different prices to MLS users than would Fallbrook" under the board of choice regime, whose arrival was imminent when they formed Sandicor. They explain: "The board-of-choice prospect buttressed the attractiveness of a centralized MLS structure, working hand-in-glove with the underlying notion of fairness of offering the same services at the same prices to all participants." In other words: "The prospect of having to compete with one another buttressed the attractiveness of a cartel, where we could fix prices and services in ways we thought were fair." Rarely do antitrust defendants serve up their own heads on so shiny a silver platter.

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[20] The district court held that "[c]ompetition for members is outside the scope of the Associations' joint venture." But MLS subscriptions are one of the services associations sell to their respective members. An association that attracts more members thereby attracts more subscribers, and thus earns more support fees from Sandicor.

[21] The associations may have been actual competitors even before board of choice, because under *Palsson*, 16 Cal.3d at 937-38, 130 Cal. Rptr. 1, 549 P.2d 833, they had to sell MLS subscriptions to nonmembers, who were not subject to NAR's geographical restrictions.

The associations are not a single entity, and so their joint venture is not immune from scrutiny under section 1.[22]

3. Defendants argue that, if we don't find them categorically immune from section 1, we should evaluate their conduct under the more forgiving "rule of reason" rather than the per se rule. Under the rule of reason, we look to the particular facts of the case to determine whether a challenged restraint is likely to enhance or harm competition. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). Although price fixing is almost always a per se violation of section 1, there are "very narrow" exceptions. *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1209 (9th Cir.1992). In *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), and *NCAA v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the Court applied the rule of reason to conduct that arguably constituted price fixing. *BMI* held that a blanket license for recordings wasn't per se illegal even though it "fixed" a "price" in some literal sense. 441 U.S. at 8-9, 99 S.Ct. 1551. The Court stated that per se rules are inappropriate in novel contexts, *id.* at 9-10, 99 S.Ct. 1551, and observed that "a necessary consequence of an aggregate license is that its price must be established." *Id.* at 21, 99 S.Ct. 1551. *NCAA* applied the rule of reason to broadcast restrictions on college football games that involved some elements of price fixing. 468 U.S. at 99-100, 104 S.Ct. 2948. It justified this approach on the theory that, in college football, "horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101, 104 S.Ct. 2948.

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[22] We note that our colleagues on the First Circuit recently disdained the *Copperweld* defense in a monogrammatically similar case. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir.2002) ("The case for expanding *Copperweld* is debatable and, more so, the case for applying the single entity label to [an] MLS.").

Defendants offer three reasons why *BMI* and *NCAA* apply. They first claim that the inherent cooperative aspects of the MLS as a joint venture warrant more deferential review. They next argue that fixing support fees is necessary to realize the "underlying notion of fairness of offering the same services at the same prices to all participants." Finally, they contend that Fallbrook and Valley Center's refusal to join the MLS on a decentralized basis made it necessary to fix support fees if the countywide MLS was to exist at all.

We reject the first argument because any elements of novelty and cooperation in the MLS are irrelevant to whether support fees are fixed or set competitively. Plaintiffs challenge the associations' support fees, not Sandicor's MLS fee, and fixed support fees are not a "necessary consequence" of the countywide MLS. *BMI*, 441 U.S. at 21, 99 S.Ct. 1551. There is no obvious technical reason that the fees must be fixed; support fees before 1992 were set independently even when two associations shared the same database. And defendants do not claim that the efficiencies of the MLS would be impaired if support fees were set competitively. *Cf. id.* at 20, 99 S.Ct. 1551 (noting that blanket licenses allow consumers to avoid the substantial transaction costs of negotiating licenses on a song-by-song basis); *Nat'l Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 601-02 (11th Cir.1986). The only apparent effect of the fixed support fee is to raise the price that consumers pay.

NCAA is likewise inapplicable. To fall within that case's protection, the price fixing need not itself be essential, *see NCAA*, 468 U.S. at 101, 104 S.Ct. 2948, but it must still be reasonably ancillary to the legitimate cooperative aspects of the venture. *See Regents of the Univ. of Cal. v. ABC*, 747 F.2d 511, 517 (9th Cir.1984) (holding per se treatment likely applicable where "[b]y any account, the purpose and effect of the horizontal restraints imposed . . . have little, if any, bearing on the operative rules"); *cf. Gen. Leaseways, Inc. v.*

Nat'l Truck Leasing Ass'n, 744 F.2d 588, 595 (7th Cir.1984) (characterizing *NCAA* as a case where there was a "plausible connection between the specific restriction and the essential character of the product" and holding that per se treatment was appropriate where "the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing"). The fixed support fee is not reasonably ancillary to the combined MLS database. Defendants offer no explanation for how it improves the efficiency of the MLS or has any effect at all beyond raising prices. Moreover, the support fee is significant relative to the price of the service as a whole; it represents more than half of what consumers pay.

We likewise reject the argument relying on the "underlying notion of fairness of offering the same services at the same prices to all participants." The "fairness" of uniform pricing is not a relevant consideration in an antitrust case; consumers are presumed to prefer lower prices to the satisfaction of knowing they paid the same inflated price as everyone else. Nor can the price fixing be justified as necessary to ensure uniform support services. Even assuming *arguendo* that defendants have a legitimate interest in standardizing support services, fixing the price of those services is not a reasonably tailored means of achieving the goal. Sandicor's service agreements already specify the services that the associations must provide. Fixing the price of those services has only the most speculative tendency to promote further uniformity.

We turn, finally, to the claim that price fixing was justified to convince the smaller associations to join the countywide MLS. This theory at least attempts to explain why the restraint itself was necessary to the joint venture. Nonetheless, it fails to state a valid defense.

We reject some justifications as a matter of antitrust policy, even though they might show that a particular restraint benefits consumers. Among these are theories that "depend[ ]

on power over price for their efficacy." 7 Phillip E. Areeda & Herbert E. Hovenkamp, *Antitrust Law* ¶ 1504c, at 361 (2d ed.2003). In *Professional Engineers*, for example, the Court held that competitive bidding could not be banned on the theory that it would tempt engineers to do shoddy work. 435 U.S. at 692-94, 98 S.Ct. 1355. The Court categorically rejected the argument that the "restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior." *Id.* at 693-94, 98 S.Ct. 1355. It noted that "[t]he logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose." *Id.* at 693, 98 S.Ct. 1355. This logic doomed the defense because the Sherman Act presumes that competition, not cartel pricing, best ensures quality products for consumers, regardless of any empirical evidence to the contrary.[23]

Like the defendant in *Professional Engineers*, the associations here seek to justify not only fixing prices, but intentionally fixing prices at a supracompetitive level. This defense is very different from the ones raised in *BMI* and *NCAA*. Defendants in *BMI* justified blanket licenses on the ground that negotiating song licenses on an individual basis is impractical. 441 U.S. at 20, 99 S.Ct. 1551. And the NCAA justified its broadcast restrictions at least in part on the need to maintain competitive balance among teams. *NCAA*, 468 U.S. at 117-20, 104 S.Ct. 2948; *see also Gen. Leaseways*, 744 F.2d at 595. Neither argument depends on the fact that the fixed price is supracompetitive. Sandicor and the associations, by contrast, fixed prices precisely in order to keep them above competitive levels. Their ultimate purpose may have been to entice the smaller associations to join the county-wide MLS, but the fee had this effect only because it was

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[23] *Professional Engineers* was a rule of reason case, but the principle applies with even more force in the per se context.

supracompetitive, not because it was fixed. Defendants seek to justify not only the forbidden practice (price fixing) but its forbidden effect (supracompetitive prices), and this they may not do. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 693, 98 S.Ct. 1355. Firms cannot fix prices as a mere quid pro quo for providing consumers with better products. Antitrust law presumes that competitive markets offer sufficient incentives and resources for innovation, and that cartel pricing leads not to a dedication of newfound wealth to the public good but to complacency and stagnation.[24]

The presumption that higher prices are bad for consumers is, in any case, amply borne out by the record. The associations' scheme bore no reasonable relation to its asserted goal. Fallbrook and Valley Center served about 400 subscribers, less than 3% of the San Diego County total. By fixing support fees, Fallbrook and Valley Center together may have made an additional $6000 per month (on top of their cash subsidy of $3000).[25] Here's the catch: The support fee was fixed at $25 not just for those 400 subscribers, but for all 14,000 subscribers in San Diego County. And, other than the trivial $3000 per month cash subsidy, only 3% of the

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[24] It does not matter that Fallbrook and Valley Center would have operated at a loss in a competitive environment. Their precarious financial situation may have explained their intransigence, but it does not transform it into a viable defense. If there is any argument the Sherman Act indisputably forecloses, it is that price fixing is necessary to save companies from losses they would suffer in a competitive market. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). While a competitor who fixes prices to stem his losses may be a more sympathetic character than one who does so to fatten his purse, he enjoys no favored legal position. Defendants' argument is more complex than the traditional cry of "ruinous competition," but it is cut from the same cloth.

[25] The $6000 figure is based on an assumed competitive price of $10, SDAR's stated costs in 1991. This is concededly a ballpark estimate, but the exact number is irrelevant to the point made.

countywide overcharge actually went to Fallbrook and Valley Center. The other 97% went into the coffers of the other associations. In the case of SDAR alone, this could have amounted to more than $1.2 million per year. Defendants are thus trying to justify overcharging consumers millions by the need to provide an implicit subsidy worth less than one-twentieth that amount. If the other associations believed it was essential to involve Fallbrook and Valley Center in the MLS, they could have allowed price competition for support services and increased the subsidies to these two associations. Instead, they adopted an anticompetitive scheme that was completely out of proportion to its asserted purpose.[26]

Moreover, defendants assume that, without Fallbrook and Valley Center, there couldn't be a true countywide MLS. But Sandicor could have formed without them and then competed for their 400 subscribers. An MLS's listings come from its subscribers, so its coverage is simply a function of who subscribes. Other than NAR's now-defunct geographical restrictions, nothing prevented subscribers in Fallbrook or Valley Center from choosing Sandicor's MLS over their local service.[27] The competitive option at a minimum was not so plainly unworkable that price fixing was necessary as a matter of law.[28]

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[26] We also note that Fallbrook and Valley Center merged into larger associations nearly a decade ago. Even if defendants' argument excused price fixing at the outset, we are at a loss to see how it justifies the persistence of the regime, given that the purported necessity no longer exists.

[27] We don't mean to suggest that NAR's restrictions would have been a valid defense while they existed. As essentially self-imposed limitations quite likely anticompetitive in their own right, they are hardly a defense to per se liability.

[28] Plenty of market defect theories do try to explain why consumers might continue using a product even after a better one becomes available. Switching costs, information asymmetries, and the *defect du jour*, the dreaded network externality, *see United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C.Cir.2001); Michael L. Katz & Carl Shapiro, *Network*

Stripped to its essentials, defendants' argument is that some of the firms they wanted to include in the joint venture were so inefficient that they could survive only under cartel pricing. Defendants' concern for the weakest among them has a quaint Rawlsian charm to it, but we find it hard to square with the competitive philosophy of our antitrust laws. Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville.

We find all the asserted defenses legally deficient or factually unsupported. The record compels the conclusion that defendants violated section 1 of the Sherman Act by fixing support fees. The district court should have denied summary judgment to defendants and granted it to plaintiffs instead.

Conspiracy To Monopolize

Plaintiffs also allege a conspiracy to monopolize the market for support services. To prevail, they must show "specific intent to monopolize and anticompetitive acts designed to effect that intent." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir.1980). "[N]o particular level of market power or 'dangerous probability of

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Externalities, Competition, and Compatibility, 75 Am. Econ. Rev. 424 (1985), all come to mind. But how are we to know, for example, whether Fallbrook and Valley Center's installed base would give them an insuperable advantage over a more efficient competitor? There are plenty of arrows in the competitive quiver that a firm might use to dislodge an incumbent: aggressive marketing, penetration pricing, free trials, money-back guarantees—are these techniques so obviously ineffective that a firm has no choice but to violate the law? Network externalities generate substantial dissent even within the economics community, and not only over how they should shape antitrust analysis, *Microsoft*, 253 F.3d at 49-50, but even over whether they exist at all, *see, e.g.*, S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, J. Econ. Persp., Spring 1994, at 133. We need not decide the point, but they seem a weak basis for an exception to a per se rule.

success' has to be alleged or proved . . . where the specific intent to monopolize is otherwise apparent from the character of the actions taken." *Id.*

Plaintiffs' section 2 case centers around restrictive provisions in Sandicor's shareholders' agreement and its rejection of Freeman's offer to run a competing service center. The shareholders' agreement reads as follows:

> ¶ 4.2. To pass a Major Corporate Resolution, . . . the holders of not less than two-thirds of the outstanding Shares cast by not less than two Shareholders must vote . . . in favor of the resolution.
>
> ¶ 4.3. A Major Corporate Resolution shall be defined as follows:
>
> . . . .
>
> (2) Any decision that substantially changes the corporate structure, including but not limited to, the admission of new Shareholders, or entering into an agreement with any other Board of Realtors or Shareholder.

Freeman proposed that Sandicor sell MLS database access to her directly at a rate that excluded the support fee, and that she resell it to agents with her own support services. Essentially, she sought to run a service center on a "decentralized" basis. Sandicor refused, explaining that her proposal was incompatible with Sandicor's centralized structure. Plaintiffs attribute this rejection to the shareholders' agreement. They draw a parallel to *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), where the Supreme Court invalidated provisions in AP's bylaws requiring a majority vote among existing newspapers to grant membership to a competitor. *Id.* at 12, 65 S.Ct. 1416.

The district court rejected the section 2 claim in part because Freeman had no bona fide intent to operate a competing service center. Even accepting this to be the case,

we conclude that plaintiffs have standing to sue. That Freeman had no bona fide competitive intent might undermine her standing as a competitor, but she is also an indirect purchaser of support services. If the associations exclude competitors, she suffers inflated prices, and she has standing to sue as an aggrieved consumer. *See In re Ins. Antitrust Litig.*, 938 F.2d 919, 926 (9th Cir.1991); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir.1991).

Nonetheless, the shareholders' agreement does not explain Sandicor's rejection of Freeman's offer. It applies only to "admission of new Shareholders, or entering into an agreement with any other Board of Realtors or Shareholder." Freeman was not asking to become a shareholder of Sandicor, only a service center operator, and we see no reason why the latter status compels the former. Moreover, although she proposed an agreement with Sandicor, she is not a Board of Realtors or a shareholder, so she is not covered by the second half of the provision either. The supermajority requirement didn't apply, so it can't have been the reason Sandicor rejected her offer.

This doesn't end the section 2 inquiry, however. Even though there was no causal relationship between the shareholders' agreement and the rejection, they each might still be independent "anticompetitive acts" sufficient to support a section 2 conspiracy claim. *See Hunt-Wesson Foods*, 627 F.2d at 926 ("[T]he [anticompetitive] act may be no more than the agreement itself.").[29] We must determine whether the evidence supports a finding that either act was driven by a specific intent to monopolize.

We find no genuine issue as to the adoption of the shareholders' agreement. Although there are some parallels

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[29] The signing of the original shareholders' agreement antedates the limitations period, but the agreement has been re-executed several times since.

between this case and *Associated Press*, the distinctions are significant. First, the agreement in *Associated Press* distinguished between new members who would compete with existing members and new members who would not. 326 U.S. at 10-11, 65 S.Ct. 1416. Sandicor's shareholders' agreement makes no comparable distinction. The absence of facial discrimination against competitors makes the inference of anticompetitive intent much weaker. Second, as noted above, the agreement applies only to new service agreements with other Boards of Realtors or shareholders. It doesn't apply to agreements with people like Freeman. This limitation on the agreement's scope further attenuates the inference of monopolistic intent.

Unlike the bylaws in *Associated Press, see id.* at 6, 65 S.Ct. 1416, the restrictive provisions here are not so anticompetitive on their face that they can be condemned without further evidence that they were adopted with specific intent to monopolize. *Cf. Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) ("[N]ot all . . . refusals to deal are predominantly anticompetitive."). The associations may have adopted them for entirely benign reasons—for example, to ensure that new shareholders would provide support services effectively or that they would not compromise the integrity of the database. Absent additional evidence that the restrictive provisions were adopted for improper reasons, they don't support a conspiracy to monopolize claim.[30] No such evidence exists in the record, so plaintiffs have failed to raise a genuine issue that the agreement violates section 2.

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[30] That the agreement itself is not anticompetitive doesn't mean that it could never be anticompetitively applied. Even if the voting mechanism is permissible on its face, voting against new shareholders for anticompetitive reasons may still be a violation of section 2.

Finally, we consider whether the rejection of Freeman's proposal violated section 2. Defendants may not "refus[e] to deal in order to create or maintain a monopoly absent a legitimate business justification." *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209 (9th Cir.1997); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). We agree with the district court that there is insufficient evidence that "Sandicor's purpose in precluding Plaintiff Freeman from operating a service center was to stifle competition." Sandicor's professed reason—that Freeman's proposal was not consistent with its current business model—is plausible. Freeman wanted to operate a service center on a decentralized basis, but Sandicor doesn't operate that way; it sells MLS subscriptions directly to agents and then reimburses its service centers for the support services they provide. It's true that one prominent element of Sandicor's business model is illegal price fixing, but that doesn't mean Freeman can demand Sandicor change the way it does business to suit her wishes.[31] Plaintiffs needed evidence that the stated reason for Sandicor's refusal was not the actual reason, and they failed to produce it. The only evidence they point to is the shareholders' agreement, but it couldn't have affected Sandicor's decision because it didn't apply to what Freeman wanted to do.

Plaintiffs have failed to raise a genuine issue that either the execution of the shareholders' agreement or the rejection of Freeman's proposal was driven by a specific intent to

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[31] Although decentralizing Sandicor would be one way to remedy the price-fixing violation, it is not the only way, and Freeman had no right to insist on it. Whether the district court may now order Sandicor to decentralize as a matter of equitable relief is a different story, and an issue we need not decide.

monopolize. The district court correctly granted summary judgment in favor of defendants on the conspiracy to monopolize claim.

Claims Against the California Association of Realtors

The California Association of Realtors isn't a party to any of the offending agreements, but plaintiffs allege that CAR lawyers encouraged the associations' antitrust violations. Plaintiffs have failed to turn up any evidence to support this theory. There is some evidence suggesting that CAR encouraged a corporate form for Sandicor, but this doesn't show that CAR encouraged the associations to fix support fees. A CAR attorney did opine that fixed support fees were legal. But nothing indicates that she recommended the arrangement, and dispassionate legal advice is not an antitrust violation. *See Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115, 118 (9th Cir.1966). Finally, plaintiffs argue that CAR is violating antitrust laws by financing the defense of this lawsuit. CAR's financial support certainly explains plaintiffs' desire to sue it, but it's hardly illegal.

Discovery Sanctions

Shortly after discovery closed, Sandicor's president Bill Stegall, who had been diagnosed with cancer, resigned and revealed to plaintiffs' counsel that documents had been withheld. Plaintiffs moved to compel discovery of the documents and asked for sanctions. A magistrate judge found that the failure to produce the documents was willful, and awarded plaintiffs their costs of filing the motion under Fed.R.Civ.P. 37(a)(4). The district court approved the award,

and we review it only for abuse of discretion. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1022 (9th Cir.2002).[32]

Relying on *Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359 (Fed.Cir.1990), defendants contend that the court abused its discretion because they had objected to the discovery requests as ambiguous, and plaintiffs never "tested" those objections. But plaintiffs' motion to compel discovery is the only testing that Rule 37(a)(4) requires. The magistrate didn't find the objections substantially justified, so plaintiffs recover the costs of bringing the motion. Fed.R.Civ.P. 37(a)(4); *Rockwell Int'l, Inc. v. Pos-A-Traction Indus., Inc.*, 712 F.2d 1324, 1325-26 (9th Cir.1983).

Conclusion

Antitrust law doesn't frown on all joint ventures among competitors—far from it. If a joint venture benefits consumers and doesn't violate any applicable per se rules, it will often be perfectly legal. The decision to combine MLS databases fits comfortably within this category. *See Realty Multi-List*, 629 F.2d at 1367-68 (extolling the many virtues of MLSs). The further decision to fix support fees does not.

We AFFIRM the district court's holding that defendants' activities substantially affected interstate commerce. We also AFFIRM summary judgment in favor of defendants on the section 2 claim and summary judgment in favor of CAR on all claims. Finally, we AFFIRM the court's award of discovery sanctions.

We REVERSE, however, on the merits of the principal section 1 claim. Plaintiffs' evidence is sufficient to prove a violation of section 1 by Sandicor and the associations.

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[32] The magistrate also awarded plaintiffs the costs of further discovery. That sanction hasn't yet been approved by the district court and isn't before us.

Defendants have presented no evidence that refutes the legal essentials of plaintiffs' case. The district court should have denied summary judgment to defendants and awarded it to plaintiffs instead.

We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part and REMANDED. Costs to appellants, except that appellee California Association of Realtors shall recover its costs from appellants.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Filed June 28, 2001]

Civil No. 98cv0139-L(JAH)
[Docket Nos. 456, 460, 462, 464, 466, 468, 470, 472, 502]

ARLEEN FREEMAN; EDWARD Y. URATA, *et al.*,
Plaintiffs,

v.

SAN DIEGO ASSOCIATION OF REALTORS, *et al.*,
Defendants.

ORDER RE: MOTION TO SUPPLEMENT ANSWER; MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; AND MOTIONS FOR SUMMARY JUDGMENT

This matter came on regularly for a hearing on Plaintiffs' motion for summary judgment and motion for permanent injunction and Defendants' motion for leave to file supplement to answer, motion to dismiss for lack of subject matter jurisdiction, and motions for summary judgment. David Barry of Barry & Associates appeared for the Plaintiffs. Charles B. Cohler of Lasky, Haas & Cohler appeared for the Defendants.

FACTUAL BACKGROUND

In January 1998, Plaintiffs Arleen Freeman, Edward Urata, and James Alexander filed this action alleging Defendants created and maintain an illegal organization to provide countywide Multiple Listing Services ("MLS"). An MLS is a method by which real estate agents exchange information on properties for sale. (Second Amended Complaint ("SAC")

¶ 12; Alkire Decl.[1] ¶ 6; Marchand Decl.[2] ¶ 3; McMillan Decl.[3] ¶ 7; Holley Decl.[4] ¶ 3.) MLS databases were first

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[1] Plaintiffs object to Anita Alkire's declaration on various grounds, including relevance, hearsay, lack of foundation, and that her declaration is argumentative, speculative, and contains conclusory and opinion testimony. Insofar as the Court has relied upon Alkire's declaration in its analysis, Plaintiffs evidentiary objections are OVERRULED. Alkire, a real estate agent for over 20 years in San Diego County and a member of the San Diego Regional MLS Committee in 1991, is competent to testify as to matters on which she has personal knowledge, such as the real estate business in San Diego County and what occurred at meetings she attended regarding the formation of Sandicor. Further, the Court finds that Alkire's declaration is not argumentative and does not contain hearsay.

[2] Plaintiffs object to Mark Marchand's declaration on the grounds it lacks foundation, gives impermissible opinion testimony, is conclusory, argumentative, speculative, and contains hearsay. Insofar as the Court has relied upon this declaration in its analysis, Plaintiffs' objections are OVERRULED. Marchand is the Executive Vice President/CEO of the Pacific Southwest Association of Realtors, and has operated that Association's local Sandicor service center. Marchand is therefore competent to testify to the operation of Sandicor service centers. Marchand's declaration also does not contain impermissible hearsay. Finally, Marchand's declaration is not argumentative, but rather states facts.

[3] Plaintiffs object to Diane McMillan's declaration on several grounds, including relevance, hearsay, and lack of foundation. They also state that the declaration presents impermissible opinion testimony and is conclusory. Insofar as this Court has relied upon McMillan's declaration, Plaintiffs' objections are OVERRULED. McMillan is the Chief Executive Officer of the North San Diego County Association of Realtors, and was the Executive Vice President of the Vista Association of Realtors from January 1, 1992 until the formation of North San Diego County Association of Realtors. She has operated local Sandicor service centers from the formation of Sandicor to the present. She is therefore competent to testify to the operation of Sandicor service centers. Further, the hearsay objections are without merit; the paragraphs objected to do not offer any out-of-court statement for the truth of the matter asserted. Finally, her declaration is not argumentative, but rather states facts.

[4] Plaintiffs object to John Holley's declaration on the grounds it lacks foundation, gives impermissible opinion testimony, is conclusory, argumentative, and speculative. Insofar as the Court has relied upon this

published in book form, but are currently available on computers. (Marchand Decl. ¶ 4; McMillan Decl. ¶ 8; Alkire Decl. ¶ 8; Holley Decl. ¶ 4.) Real estate agents seeking to purchase and sell properties on their clients' behalf rely on MLSs to submit and obtain updated information on the availability of properties for sale in San Diego. (SAC ¶ 12; Marchand Decl. ¶ 3; McMillan Decl. ¶ 7; Alkire Decl. ¶ 6; Holley Decl. ¶ 3.) Plaintiffs are real estate agents who are not members of Realtors' Associations but purchased MLS from Defendants. (*See* SAC ¶ 6.) Defendants are: Sandicor, Inc., the direct provider of a countywide MLS; SDAR, North San Diego County Association of Realtors, Pacific Southwest Association of Realtors, Inc., East San Diego County Association of Realtors, Coronado Association of Realtors (the "Associations"); California Association of Realtors ("CAR"); and 28 current and former directors or executive officers of the Associations or Sandicor. (*See* SAC ¶¶ 9-11.)

Historically, MLS services have been provided by and located at the offices of Boards or Associations of Realtors. (Alkire Decl. ¶ 8.) Prior to 1976, California Realtor associations sold MLS services only to their members. Nonmembers were not permitted to purchase MLS services. (SAC ¶ 13.) In 1976, the California Supreme Court in *Marin County Bd. of Realtors v. Palsson*, 16 Cal. 3d 920, 940 (1976) declared the MLS an essential tool to real estate agents and required real estate associations to offer MLS services to nonmembers at a reasonable fee. (SAC ¶ 14.) Nonmember

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declaration in its analysis, Plaintiffs' objections are OVERRULED. Holley was an employee of the San Diego Association of Realtors ("SDAR") from April 1990 to January of 1997, and from the date Sandicor commenced operations had primary responsibility for operating SDAR's local Sandicor service center. Since August 1999, Holley has been an employee of Sandicor and currently is its President/CEO. Holley therefore is competent to testify to the operation of Sandicor service centers, and his declaration contains permissible observations from his experiences. The Court further finds his declaration is not argumentative.

real estate brokers who purchased MLS services became known as "*Palsson* brokers." Although not members of a real estate association, these brokers were permitted to use an association's MLS services for a price consistent with the per capita cost of operation.

Prior to the creation of Defendant Sandicor in 1992, there were 12 different MLSs in San Diego County using four separate and independent MLS databases. (Alkire Decl. ¶ 11.) Eleven of these MLSs were run by the eleven Boards or Associations of Realtors existing in San Diego County at the time. *Id.* Each Board or Association had its own fee structure, regulations, and operated its own service center to provide its MLS to users. *Id.* During that time, the National Association of Realtors required the eleven Boards or Associations to operate only within a limited geographic area that collectively covered all of San Diego County. (Alkire Decl. ¶ 12.)

The Coronado Board of Realtors' MLS database covered Coronado. (Alkire Decl. ¶ 13.) The Oceanside Board of Realtors, Escondido Board of Realtors, Vista Board of Realtors, San Dieguito Board of Realtors, Carlsbad Board of Realtors, Fallbrook Board of Realtors, and Valley Center Board of Realtors used an MLS database that covered the northern part of San Diego County and referred to as the "North County MLS." *Id.* The San Diego Board of Realtors, East San Diego County Board of Realtors, and South San Diego Bay Cities Board of Realtors used an MLS database covering the southern part of San Diego County that was referred to as the "South County MLS." *Id.*

The Real Estate Brokers Association ("REBA") privately ran and operated the twelfth MLS using the fourth MLS database. (Alkire Decl. ¶¶ 12, 13; Alkire Supp. Decl. ¶ 2.). REBA's MLS database covered La Jolla. (Alkire Decl. ¶ 12; Alkire Supp. Decl. ¶ 2-3.) REBA's MLS was redundant in that it was located entirely within the geographic area

serviced by the San Diego Board of Realtors. (Alkire Decl. ¶ 12; Alkire Supp. Decl. ¶ 2-3.)

Defendants refer to the MLS system that existed prior to 1992 as a "decentralized" approach. In 1990-1991, the eleven Boards or Associations of Realtors chose to establish what Defendants call a "centralized" approach: a single, county-wide MLS database that would provide property information for the entire San Diego County. (Alkire Decl. ¶¶ 21-22.) Bill Opie and Manley Bland formed the "San Diego County Regional MLS Committee," that was comprised of representatives from each of the eleven MLSs operated by the eleven Boards or Associations of Realtors. (Alkire Decl. ¶ 22.) After holding meetings and consulting with lawyers from CAR, the Boards or Associations of Realtors formed a new corporation, Defendant Sandicor, that provided a fully integrated, homogenous, countywide MLS. (Alkire Decl. ¶¶ 22-42; Barlow Decl.[5] ¶¶ 5-20; *see* SAC ¶ 18.)

Sandicor set a uniform price for its countywide MLS service that provided the same service to all users anywhere in San Diego County. (Alkire Decl. ¶¶ 41, 55-61; *see* SAC ¶ 20.) In December 1991, each of the eleven Boards or

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[5] Plaintiffs object to June Barlow's declaration citing lack of foundation, relevance, hearsay, and on the grounds that it is speculative, provides impermissible opinion testimony, and is conclusory. To the extent the Court has relied on Barlow's declaration in ruling on the motions, Plaintiffs' objections are OVERRULED. Barlow has been one of CAR's legal counsel since 1980 and its general counsel since 1996. She is therefore competent to testify as to the benefits of CAR's provision of legal advice to the real estate community, and she is also competent to testify as to the legal advice CAR provided to the other Defendants and to her knowledge obtained from attending meetings of the San Diego County Regional MLS Committee. The Court also finds that the hearsay objections are without merit because the statements of others Barlow refers to are for the purpose of showing what Barlow believed when giving legal advice. The Court further finds Barlow's declaration is not argumentative, but rather states facts.

Associations who combined to form Sandicor executed a Service Center Agreement with Sandicor that enumerated many of the services that the Boards of Realtors agreed to provide to MLS users on Sandicor's behalf through their local Sandicor service centers. (Alkire Decl. ¶¶ 43-54; Marchand Decl. ¶¶ 7-19; McMillan Decl. ¶¶ 11-23; Holley Decl. ¶¶ 7-19; *see, e.g.*, SAC at 72-77, Service Center Agreement.) Sandicor's countywide MLS officially commenced operations on January 1, 1992. (Alkire Decl. ¶ 55; Marchand Decl. ¶ 7; McMillan Decl. ¶ 11; Holley Decl. ¶ 7.) The benefit of Sandicor's countywide MLS is that real estate agents now only need to purchase MLS services from one Association to obtain countywide property information.

Until 1994, the National Association of Realtors had a regulation that required individuals who wished to join an Association or Board of Realtors to join the Association in the geographical area where the prospective member's office was located. (Alkire Decl. ¶ 38; Barlow Decl. ¶ 11.) In 1994, "board of choice" came into effect. (Alkire Decl. ¶ 38; Barlow Decl. ¶ 11.) This allowed real estate professionals to join any Association or Board, regardless of the location of the individual's office. (Alkire Decl. ¶ 38; Barlow Decl. ¶ 11.) Thereafter, real estate professionals could purchase Sandicor's countywide MLS from any Association or Board in San Diego County to receive MLS services.

In late 1997, Bill Stegall, then-President/Chief Executive Officer of Sandicor, presented a business plan for the operation of Sandicor entitled "IntelliQuick." (Alkire Decl. ¶ 62.) The IntelliQuick plan proposed that many if not all of the MLS functions that had been performed at the local Sandicor service centers would instead be performed at Sandicor's corporate headquarters. *Id.* After discussion, the board of directors of Defendant SDAR voted to reject the IntelliQuick business plan. (Alkire Decl. ¶ 63.) In part, the directors found the IntelliQuick business plan "conflicted

with the fundamental principles upon which Sandicor was founded and the basis on which SDAR agreed to participate in the Sandicor venture." (Alkire Decl. ¶ 64.) The Associations' offices not only provide MLS services, but also are locations where, for example, "real estate agents . . . meet, exchange information, enroll in real-estate related classes, purchase real estate-related products, get answers to questions about current laws and regulations, learn about community affairs that affect real estate professionals and their clients." (Alkire Decl. ¶ 65.) Sandicor's founders favored the operation of service centers by the local Associations "due to the great efficiencies that result from the sharing of facilities and personnel between MLS and Association activities." (Alkire Decl. ¶ 65.)

PROCEDURAL BACKGROUND

Plaintiff Arlene Freeman initially challenged the Sandicor MLS in a state court case she filed on April 16, 1997. Freeman alleged that Sandicor, SDAR, and several other real estate associations and individuals violated California's antitrust laws by charging excessive fees for access to Sandicor's MLS, improperly tying the sale of Sandicor's MLS to Enhanced Services, and engaging in a group boycott. Freeman also asserted the excessive fee for Sandicor's MLS violated a 1984 injunction ordering that access to SDAR's residential MLS and investment property MLS be available on "equal footing" to all licensed real estate agents regardless of their membership in SDAR. After the state court sustained demurrers to successive amended complaints, Freeman stipulated to a judgment of dismissal that was entered on December 15, 1997.

Freeman filed an appeal, and the Fourth District Court of Appeal affirmed the trial court. *Freeman v. San Diego Assoc. of Realtors*, 77 Cal. App. 4th 171 (1999). The appellate court found that the complaint did not state an illegal tying arrangement because the challenged Enhanced Services did not

comprise services separate from access to Sandicor's MLS, and that case law did not support a theory that tying to evade price controls, unaccompanied by anticompetitive effects, violates antitrust laws. *Freeman*, 77 Cal. App. 4th at 183-88. *Freeman* further found that the complaint did not state a price fixing claim because the combination of the Associations into Sandicor to provide a countywide MLS was a single enterprise pursuing a common purpose and therefore there was not the plurality of separate entities necessary to a price-fixing conspiracy claim. *Id.* at 188-94. Next, the appellate court held that the complaint did not state a group boycott claim, finding Freeman's allegations conclusory. *Id.* at 195-98. The court also ruled that Freeman's charge that the price of Sandicor's MLS was excessive failed to state a claim. The court found that unilateral pricing decisions by a monopoly holder are ordinarily not unlawful, and no California case has carved an exception and imposed price controls on MLSs under the Cartwright Act. *Id.* at 199-203. Finally, the California court rejected Freeman's claim against SDAR for violating the 1984 injunction, finding that the complaint's allegations established that the party enjoined, SDAR, was not the party whose actions Freeman alleged violate the 1984 injunction. *Id.* at 203-04. Freeman's petition for rehearing was denied by the Court of Appeal, and the California Supreme Court denied a petition for review. (Defs' Req. for Jud. Not.[6] Exhs.19, 20.)

On January 27, 1998, Freeman, Urata, and Alexander filed the instant lawsuit individually and on behalf of all persons who were brokers or salespersons licensed by the California Department of Real Estate and who, at any time

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[6] Defendants have requested the Court take judicial notice of several documents filed in Plaintiff Freeman's state court action. This Court finds such documents are the proper subject of judicial notice under Federal Rule of Evidence 201. Accordingly, insofar as this Court has relied on such documents, Defendants' request for judicial notice is GRANTED.

after April 16, 1993, paid fees to Defendants for Sandicor's MLS.[7] According to Plaintiffs, Sandicor never issued shares and was operated as a "shell" corporation by the local real estate associations. (SAC ¶ 19.) In the Second Amended Complaint, Plaintiffs contend the Defendants wrongfully conspired to fix the price of MLS services at a price higher than the cost of providing these services. (SAC ¶ 147-50.) Plaintiffs also allege Sandicor and the local real estate associations sought to evade the pricing controls established by *Palsson* by requiring independent real estate brokers to purchase a bundle of "Enhanced Services" created and sold exclusively by the Associations. (SAC ¶¶ 21-25.) Plaintiffs claim these Enhanced Services are useless to real estate brokers and cost the Associations almost nothing to produce. *Id.* Plaintiffs further contend that the Defendants have conspired to forbid Sandicor from selling directly to the stated MLS class, creating an unlawful "group boycott." (SAC ¶¶ 127-31.) The Second Amended Complaint alleges Defendants violated Sections 1 and 2 of the Sherman Anti-trust Act,[8] the California Cartwright Act, and the California Unfair Competition Act.

By order dated July 29, 1998, the Honorable Barry T. Moskowitz granted the individual defendants' motion to dismiss, dismissed all claims against the director and officer Defendants, and granted leave to file an amended complaint. On September 15, 1998, Plaintiffs filed a First Amended

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[7] By order dated May 6, 1999, the Honorable Thomas J. Whelan denied Plaintiffs' motion for class certification. On June 2, 1999, Judge Whelan denied Plaintiffs' *ex parte* application for leave to file a motion for reconsideration of his May 6, 1999, order. Plaintiffs subsequently renewed their motion for class certification before this Court. By order dated November 7, 2000, this Court denied Plaintiffs' renewed motion for class certification.

[8] Unless otherwise noted, all future citations to "Section" reference the Sherman Act.

Complaint. The director and officer Defendants then moved to dismiss the complaint. On March 2, 1999, the Judge Whelan dismissed without prejudice all claims against all of the individual Defendants with the exception of Anita Alkire. Judge Whelan also denied Defendants' motion to strike. On March 24, 1999, Plaintiffs filed a Second Amended Complaint.

On June 30, 1999, Plaintiffs filed a motion for partial summary judgment. On July 2, 1999, Defendants filed a motion to dismiss for lack of subject matter jurisdiction, or in the alternative, for summary judgment in their favor on the "interstate commerce" element of plaintiffs' federal antitrust claim. Defendants also filed three motions for summary judgment.

Plaintiffs submitted an application pursuant to Federal Rule of Civil Procedure [9] 56(f) on October 8, 1999, requesting leave of Court to conduct additional discovery, and submit supplemental evidence and briefing on the pending summary judgment motions. This Court granted Plaintiffs' motion and denied all the pending motions without prejudice to refiling after the additional discovery was complete. Plaintiffs also successfully moved to compel discovery and reopen discovery before the Honorable John A. Houston.[10]

Currently before the Court are numerous motions filed by all the parties. Plaintiffs have brought a motion for summary judgment and permanent injunction. Defendants have brought a motion to supplement their answer to add the affirmative

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[9] Unless otherwise noted, all future citations to "Rule" shall refer to the Federal Rules of Civil Procedure.

[10] In granting Plaintiffs' motions, Judge Houston also awarded sanctions in Plaintiffs' favor and against the Defendants for withholding documents and information regarding the IntelliQuick plan. Defendants have filed objections to Judge Houston's orders regarding the sanctions. The Court is addressing those objections by separate order.

defenses of *res judicata* and collateral estoppel. Defendants have also filed six other motions: Motion Number 1 is to dismiss for lack of subject matter jurisdiction, arguing there is no interstate commerce. Defendants' Motion Number 2 is a motion for summary judgment by all Defendants as to the California state law claims. Defendants' Motion Number 3 is a motion for summary judgment by all Defendants addressing the merits of the federal antitrust claims. Defendants' Motion Number 4 is a motion for summary judgment by the only remaining individual defendant, Anita Alkire. Motion Number 5 is a motion for summary judgment by Defendant CAR, submitting that it cannot be liable for having provided legal advice or for thereafter providing financial support to defend this litigation. Motion Number 6 is a summary judgment motion by all Defendants against Defendant Freeman based on the *res judicata* and collateral estoppel effects of the California Court of Appeal final judgment.

In the motions before the Court, Plaintiffs' theory of the case has changed from what they alleged in the Second Amended Complaint. In the Second Amended Complaint, Plaintiffs stated that "Enhanced Services were only sold to MLS users, and all MLS users were required to buy the Enhanced Services." (SAC ¶ 22.) Plaintiffs now refer to these "Enhanced Services" as "service center functions," and state that their central claim is "that the Associations fixed the price they would charge Sandicor for service center functions. Those fixed and inflated prices, varying from $22 to $25 per user per month, were passed on to users. At various times, the San Diego Association wanted to charge less, and the price fixing agreement of Defendants barred San Diego from lowering its prices. Without competition from San Diego, all the other Associations kept their service center prices artificially high." (Plts' Oppo. to Defs' Mot. for Sum. Judg't No. 3 at l.)

Plaintiffs request the Court strike the tying and group boycott claims. (Plts' Oppo. to Defs' Mot. Sum. Judg't No. 3 at 9.) Plaintiffs state that "[t]he appearance of the IntelliQuick plan has clarified the thinking of the plaintiffs, and the tying and group boycott claims are no longer necessary. By separate application, we request the Court to strike those portions of the second amended complaint." *Id.* Plaintiffs further ask, however, that the Court not grant summary judgment against them on the tying claim. Defendants respond that these claims should be dismissed with prejudice as Plaintiffs have not cited any authority to support their request. The Court agrees. Plaintiffs have abandoned these claims, and therefore Plaintiffs' group boycott and tying claims are DISMISSED WITH PREJUDICE.

DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO ANSWER

Defendants filed their answer to the Second Amended Complaint on April 13, 1999. Subsequently on December 27, 1999, the California Court of Appeal affirmed the judgment of the Superior Court against Plaintiff Freeman in the parallel California antitrust case, *Freeman v. San Diego Association of Realtors*, 77 Cal. App. 4th 171 (1999). Freeman's petition for rehearing was denied by the Court of Appeal, and the California Supreme Court denied a petition for review. (Defs' Req. for Jud. Not. Exhs. 19, 20.) In light of the finality of that judgment, Defendants seek to supplement their answer under Rule 15(d) to add *res judicata* and collateral estoppel as affirmative defenses.

Plaintiffs did not file an opposition to Defendants' motion. Under Civil Local Rule 7.1(f)(3)(c), if an opposing party fails to file the papers as required under the local rules, that failure may constitute a consent to the granting of a motion. Civ. L. R. 7.l(f)(3)(c). On this basis, Defendants' motion is granted.

Further, as stated on the record, a review of the merits of the motion also compel that Defendants be granted leave to supplement their answer. A supplemental pleading is used to allege relevant facts occurring after the original pleading was filed. Fed. R. Civ. P. 15(d); *Keith v. Volpe*, 858 F.2d 467, 473-74 (9th Cir. 1988). Events occurring since the filing of the original pleading must have "some relationship" to the claims in the original. *Id.* at 474. As such, a supplemental pleading is designed to bring the action "up to date" and to set forth new facts affecting the controversy that may have occurred since the original pleading was filed. *Manning v. City of Auburne*, 953 F.2d 1355, 1359-60 (11th Cir. 1992). New claims, new parties, and events occurring after the original action was filed are all proper in supplemental pleadings. *See* Fed. R. Civ. P. 15(d).

Here, the finality of the state court decision is an event that occurred subsequent to the Defendants' filing their answer. Because *res judicata* and collateral estoppel are now viable defenses, this Court should freely grant leave to supplement the answer. *Tucker v. Arthur Andersen & Co.*, 87 F.R.D. 124, 127 (S.D.N.Y. 1980) *rev'd on other grounds*, 646 F.2d 721, 724 (2d Cir. 1981). Thus, considering applicable law and Plaintiffs' failure to file an opposition, as stated on the record, Defendants' motion for leave to supplement their answer is GRANTED.

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants have filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Plaintiffs cannot establish that the activities at issue involve "interstate commerce" to invoke federal jurisdiction under the Sherman Act.

I. Applicable Law.

Jurisdiction in this action is based on federal question jurisdiction, as the first three causes of action allege claims

under the Sherman Antitrust Act. Under the Sherman Act, the defendant's business activities must be "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The requisite relationship to interstate trade or commerce is a necessary jurisdictional element. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980); *United States v. ORS, Inc.*, 997 F.2d 628, 629 (9th Cir. 1993). The United States Supreme Court has stated that:

> jurisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings . . . .

McLain, 444 U.S. at 242. If the jurisdictional element of interstate commerce is not met, the Court may dismiss the action under Rule 12(b)(1) for lack of subject matter jurisdiction.

Congress has broad authority under the Commerce Clause to regulate activities that, "while wholly local in nature, nevertheless substantially affect interstate commerce." *Id.* at 241. The Supreme Court has also noted that the Sherman Act has a "correspondingly broad reach." *Id.* Thus, "as the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328-29 (1991.)

Courts have devised two alternative tests for determining whether a necessary relationship exists between the restraint and interstate commerce. *McLain*, 444 U.S. at 241-42. The

first is the "flow of commerce" test and applies to goods or services that cross state lines. *See id.* The second is the "affecting commerce" test that looks at activities that, which wholly local in nature, have "an effect on some other appreciable activity demonstrably in interstate commerce." *Id.* at 242; *Palmer v. Roosevelt Lake Log Owners Ass'n, Inc.*, 651 F.2d 1289, 1291 (9th Cir. 1981). In *McLain*, the Supreme Court stated that a plaintiff must first identify a relevant aspect of interstate commerce, and then, defendants' activities must be shown "'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *McLain*, 444 U.S. at 246.

Defendants correctly note there is a split in authority as to whether a plaintiff must show a nexus between interstate commerce and the defendant's general business activities, or a nexus between interstate commerce and defendant's allegedly illegal activities. *See* 1 Julian O. von Kalinowski *et al.*, *Antitrust Laws and Trade Regulation* § 6.02[1] at 6-19 (2d ed. 2000). Contrary to several other circuits, several cases in the Ninth Circuit have adopted the more expansive test, requiring only that a plaintiff show a connection between a defendant's general business activities and interstate commerce. *Musick v. Burke*, 913 F.2d 1390, 1395 (9th Cir. 1990), *Palmer*, 651 F.2d at 1291; *Western Waste Serv. Sys. v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.1980). For example, in 1990, the Ninth Circuit stated that "[i]n determining jurisdiction under the Sherman Act, the focus of the inquiry is the defendant's business activities," and that the plaintiff can make a showing of a substantial effect on interstate commerce either by the defendant's general business activities *or* the antitrust violations themselves. *Musick*, 913 F.2d at 1395. This Court is bound by Ninth Circuit law. Accordingly, the Court declines Defendants' invitation to adopt the more stringent test that requires a plaintiff to show a defendant's allegedly anticompetitive activities have a not insubstantial effect on interstate commerce.

II. Discussion.

Whether Defendants' "'activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact-based question calling for common sense judgment.'" *Musick*, 913 F.2d at 1395 (*quoting Mitchell v. Frank R. Howard Mem'l Hosp.*, 853 F.2d 762, 765 (9th Cir. 1988). Defendants are in the real estate business. The sale of homes listed on Sandicor's MLS during 1995, 1996, and 1997 totaled over $23 billion. (Plts' Exh. 191; Bergmann Supp. Decl. Exh. 6 at 82, Interrogatory No. 8.3.) Plaintiffs' expert witness has opined that these sales have affected approximately $10 billion in interstate commerce through as a result of home-mortgage financing. (Plts' Exh. 196, Kamin Decl. at 2-4.) From 1994 to 1998, the United States Department of Housing and Urban Development endorsed 39,962 loans in San Diego County. (Plts' Exh. 194.)

Further, during this time period Sandicor paid over $3 million to Moore Data in Minneapolis, Minnesota, to license computer software. (Bergmann Supp. Decl. Exh. 6 at 86, Interrogatory No. 8.8.) Although the "purchase of supplies and equipment from out of state, *by itself*, is insufficient to identify a relevant aspect of interstate commerce substantially affected by an antitrust defendant's business activities," *Musick*, 913 F.2d at 1396, consideration of these purchases in conjunction with the effect of real estate sales on interstate commerce bolster the conclusion that this Court has subject matter jurisdiction over this action. Defendants' motion to dismiss for lack of subject matter jurisdiction is therefore DENIED.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT No. 3 & PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE FEDERAL ANTITRUST CLAIMS

I. Legal Standard for Summary Judgment.

Rule 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of establishing an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Where the party moving for summary judgment does not bear the burden of proof at trial, it may show that no genuine issue of material fact exists by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* at 325. The moving party is not required to produce evidence showing the absence of genuine issue of material fact, nor is it required to offer evidence negating the moving party's claim. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989). Rather, "the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." *Lujan*, 497 U.S. at 885 (*quoting Celotex*, 477 U.S. at 323).

In contrast, when the moving party bears the burden of proof at trial, it cannot obtain summary judgment unless it presents evidence so compelling that no rational jury would fail to award judgment for the moving party. *See, e.g., Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35 (1st Cir. 1998). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the non-moving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

Once the moving party meets the requirements of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The non-moving party does not meet this burden by showing "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The United States Supreme Court has held that "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Anderson*, 477 U.S. at 252. Accordingly, the non-moving party cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings." *Id.* at 256. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 325.

When ruling on a summary judgment motion, the Court must examine all the evidence in the light most favorable to the non-moving party. *Id.* The Court cannot engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the jury. *Anderson*, 477 U.S. at 255.

II. Section 1 Claim.

A. Applicable Law.

Section 1 of the Sherman Act "prohibits conspiracies and agreements that unreasonably restrain trade." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir. 1989); 15 U.S.C. § 1. "A section 1 plaintiff must prove an agreement between two or more persons to restrain trade, because unilateral conduct is not illegal under section 1." *Levine v. Central Florida Med. Affiliates, Inc.*, 72 F.3d 1538, 1545 (11th Cir. 1996). But not every agreement that restrains competition violates the Sherman Act; rather, to be unlawful, the agreement must *unreasonably* restrain competition. *McDaniel v. Appraisal Inst.*, 117 F.3d 421, 422 (9th Cir. 1997); *Thurman Indus.*, 875 F.2d at 1373; *Levine*, 72 F.3d at 1545. The unreasonableness of the agreement is analyzed under either a *per se* rule of illegality or a rule of reason analysis. *McDaniel*, 117 F.3d at 422; *Thurman Indus.*, 875 F.2d at 1373. The *per se* rule applies only where the practice at issue "'facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *D.A. Rickards, M.A. v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332 (9th Cir. 1986) (*quoting National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984)); *Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1091 (9th Cir. 2000). "*Per se* violations are 'naked restraints of trade with no purpose except stifling of competition,' and have been characterized as so 'plainly anti-competitive' and lacking 'any redeeming virtue' that they are presumed illegal under § 1.'" *United States v. Andreas*, 216 F.3d 645, 666 (7th Cir.), *cert. denied*, __ U.S. __, 121 S.Ct. 573 (2000) (internal citation omitted); *see National Collegiate*, 468 U.S. at 100 (holding that a practice that facially appears to restrict competition "is presumed unreasonable without inquiry into the particular market context in which it is found."). Some

practices, such as horizontal price-fixing, are subject to a *per se* analysis. *National Collegiate*, 468 U.S. at 101 & n.21.

Agreements that are not presumed unreasonable under the *per se* category are analyzed under the "rule of reason" test. *Levine*, 72 F.3d at 1546. Under a rule of reason analysis, the plaintiff must show: "'(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually restrains competition.'" *Thurman Indus.*, 875 F.2d at 1373 (*quoting Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988)); *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992). "An essential element of a Section 1 violation under the rule of reason is injury to competition in the relevant market." *Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 858 F.2d 567, 570 (9th Cir. 1988). Thus, the antitrust violation must harm competition, not just competitors. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811-12 (9th Cir. 1988).

B. Discussion.

Plaintiffs contend the Associations are engaged in an unlawful conspiracy or agreement to fix the prices they charged Sandicor for service center functions, and that those prices were then passed on to MLS users. Plaintiffs' Section 1 theory, therefore, is that they were harmed as indirect purchasers. Defendants respond that they did not engage in price fixing, that the indirect purchaser theory is inapplicable to this action, and that Plaintiffs cannot show joint conduct that is required for Section 1 claims. Before examining the merits of Plaintiffs' Section 1 claim, the Court finds it is first necessary to analyze whether the facts support Plaintiffs' claim they are indirect purchasers of service center functions.

1. Whether Sandicor Purchases Service Center Functions from the Associations.

Plaintiffs contend that when forming Sandicor, the Associations decided they would become vendors to Sandicor with Sandicor paying the Associations to provide service center functions, and the MLS users would purchase their MLS service from Sandicor. (Plts' Mot. for Part. Sum. Judg't at 2.) Plaintiffs state "there was nothing inherently wrong with that organizational structure," and do not question Sandicor's right to set a uniform price for its MLS. *Id.* Rather, Plaintiffs' argue that the Associations' second decision to fix the price at which the Associations sold service center functions to Sandicor violated Section 1. *Id.* Plaintiffs' thus contend that Defendants caused antitrust injury to "indirect purchasers."

The Court agrees with Defendants that the evidence does not support Plaintiffs' characterization of Sandicor as a purchaser of service center functions from the Defendant Associations. When the Associations formed Sandicor, each Association entered into a Service Center Agreement with Sandicor that enumerated many of the services the Associations agreed to provide on Sandicor's behalf. (Alkire Decl. ¶¶ 43-54; Marchand Decl. ¶¶ 7-19; McMillan Decl. ¶¶ 11-23; Holley Decl. ¶¶ 7-19; *see, e.g.*, SAC at 72-77, Service Center Agreement.) In their original, First, and Second Amended Complaints, as well as in their complaint in state court, Plaintiffs referred to these services as "Enhanced Services." *See Freeman*, 77 Cal. App. 4th at 181 (listing the Enhanced Services performed by service centers); (Complaint ¶¶ 20-22; First Amended Complaint ¶¶ 75-90; SAC ¶¶ 23-25.) In these motions, Plaintiffs refer to these services as "service center functions." (*See* Plts' Mot. for Part. Sum. Judg't at 1 ("The second cost was unique to each joint venturer to maintain its offices where it enrolled and trained new MLS users, to produce quarterly bills, to deal face-to-face and over the phone with MLS users. Defendants called the latter 'service

center' functions.").) But Plaintiffs have presented no evidence that either establishes (for their motion for partial summary judgment) or creates a triable issue of material fact (in opposition to Defendants' motion for summary judgment) that these "service center functions" were sold *by* the Associations *to* Sandicor, and then resold to MLS users. A review of the Service Center Agreements entered into between the Associations and Sandicor reveals the Associations do not sell service center functions to Sandicor, but rather provide Sandicor's MLS to users.

The Service Center Agreements provide that "SANDICOR wishes to establish a local SANDICOR Service Center to service SANDICOR's MLS participants and the Association wishes to operate such a center as an independent contractor of SANDICOR." (Complaint at 72, Service Center Agreement ¶ D.) The Agreements require the Associations to provide various services to Sandicor MLS participants (that Plaintiffs refer to as "service center functions"), including enrollment, billing, inputting and monitoring listings, providing forms, distributing Sandicor MLS books, stocking and distributing Sandicor property data profile sheets, maintaining records on Sandicor participants, providing meeting facilities, providing staff to answer questions, processing reciprocal listing on properties, and such other duties that may be agreed upon by Sandicor and the Associations. (Complaint at 72-73, Service Center Agreement ¶ 1.) In return, Sandicor agreed to pay to the Associations servicing fees for subscription, enrollment, insertions, status changes, supplemental remarks, reciprocal listings, and copies of listings and photos. (Complaint at 73, Service Center Agreement ¶ 2.)

In *Freeman*, the California appellate court found Plaintiff Freeman's complaint did not adequately allege the threshold element for a tying claim: "the existence of separate products or services in separate markets." *Freeman*, 77 Cal. App. 4th at 184. While Plaintiffs have dropped their tying claim, the

California Court of Appeal's analysis is relevant to the issue presented here: whether the Associations sell "service center functions" to Sandicor, as Plaintiffs claim, or whether the service center functions are in reality a part of a single product—Sandicor's MLS, as Defendants contend.

The declarations Defendants have presented in support of their motions for summary judgment establish that the "service center functions" Plaintiffs claim the Associations sold to Sandicor are in fact part of the MLS services Sandicor offers. (Alkire Decl. ¶¶ 43-54; Holley Decl. ¶¶ 7-19; McMillan Decl. ¶¶ 11-23; Marchand Decl. ¶¶ 7-19.) For example, the enrollment, billing, and record-keeping functions are a necessary part of Sandicor's MLS—the countywide listing service could not exist without current contact information of users who represent clients interested in selling or purchasing real estate, nor could it exist without a revenue stream that allows Sandicor to meet its financial obligations to operate. (Alkire Decl. ¶¶ 44-45, 50; Holley Decl. ¶¶ 9-10, 15; Marchand Decl. ¶¶ 9-10, 15; McMillan Decl. ¶¶ 13-14, 19.) Similarly, the service centers' agreement to input and monitor listings into Sandicor's MLS, and to provide staff to answer questions regarding Sandicor's MLS are necessary to ensure those MLS users unwilling or unskilled in inputting their own listings are able to add information into the database and obtain information from the database. (Alkire Decl. ¶¶ 46-47, 5l; Holley Decl. ¶¶ 11-12, 16; Marchand Decl. ¶¶ 11-12, 16; McMillan Decl. ¶¶ 15-16, 20.) These functions also allow trained professionals to verify that all listings comply with, Sandicor's rules and regulations. (Alkire Decl. ¶¶ 46-47; Holley Decl. ¶¶ 11-12; Marchand Decl. ¶¶ 11-12; McMillan Decl. ¶¶ 15-16.) The service centers' agreement to provide forms for Sandicor MLS rules complaints and to forward any complaints to Sandicor for processing similarly ensures the integrity of the information in Sandicor's MLS database. (Alkire Decl. ¶ 47; Holley Decl. ¶ 12; Marchand Decl. ¶ 12; McMillan Decl. ¶ 16.)

Sandicor ceased publishing MLS books in 1996. (Alkire Decl. ¶ 48; Holley Decl. ¶ 13; Marchand Decl. ¶ 13; McMillan Decl. ¶ 17.) Accordingly, it is not currently possible that the Associations sell this nonexistent product to Sandicor. *See Freeman*, 77 Cal. App. 4th at 186 ("It is conceptually impossible that there is a market for a nonexistent service (here, delivery of nonexistent books) that was substantially injured by Sandicor's nonexistent distribution service.") Similarly, a few years ago Sandicor ceased contracting with its service centers for them to process reciprocal listings. (Alkire Decl. ¶ 53; Holley Decl. ¶ 18; Marchand Decl. ¶ 18; McMillan Decl. ¶ 22.) After Sandicor entered into a statewide "Master Reciprocal Agreement," to ensure uniformity, Sandicor began processing all reciprocal listings itself. (Alkire Decl. ¶ 53; Holley Decl. ¶ 18; Marchand Decl. ¶ 18; McMillan Decl. ¶ 22.) Therefore, the service center functions no longer provide a "reciprocal listing" service that occupies a separate market from Sandicor's MLS and sold by the Associations to Sandicor.

The Court further finds that the stocking and distribution of Sandicor forms is not a service for which a market separate from Sandicor's MLS exists. First, Sandicor's property data profile sheets (or input listing forms) contain standardized fields of information to ensure all the necessary information is input into Sandicor's MLS and helps preserve the integrity of the listing service. (Alkire Decl. ¶ 49; Holley Decl. ¶ 14; Marchand Decl. ¶ 14; McMillan Decl. ¶ 18.) Similarly, Sandicor's other standardized forms are designed to maintain Sandicor's MLS and attendant rules and regulations. (Alkire Decl. ¶ 49; Holley Decl. ¶ 14; Marchand Decl. ¶ 14; McMillan Decl. ¶ 18.) The service centers' agreement to provide meeting facilities allows subscribers to take classes on how to use Sandicor's MLS at locations more convenient to them, rather than at Sandicor's headquarters. (Alkire Decl. ¶ 51; Holley Decl. ¶ 16; Marchand Decl. ¶ 16; McMillan

Decl. ¶ 20.) This function therefore is integrally tied to Sandicor's MLS.

Plaintiffs have not pointed to any evidence either establishing or creating a triable issue of material fact that these "service center functions," previously referred to as "Enhanced Services" are separate and distinct products or services from the MLS services that Sandicor offers. The evidence before the Court establishes that the Service Center Agreements require the Associations to deliver these services—as part of *Sandicor's* MLS services—*to Sandicor's* MLS participants. Sandicor does not purchase any service or product from the Associations, and Sandicor does not resell any service or product received from the Associations to Sandicor's MLS participants. Consequently, the Court finds the record shows that the price set for Sandicor's countywide MLS was set by Sandicor, and there is no evidence to support Plaintiffs' claim that the Associations sell service center functions to Sandicor who passes on an inflated price to consumers.

2. Whether There is Joint Conduct.

Plaintiffs contend that Sandicor is not acting unilaterally but rather is a "front" or "shell" for the Defendant Associations. Defendants respond that Plaintiffs' allegations fail under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) because there is no joining of independent interests as required by Section 1. Rather, Defendants contend that Sandicor was formed by its Association shareholders to pursue the common goal of creating and administering a countywide MLS. Defendants further maintain that Sandicor is the entity that has decided which MLS services to offer and the price it will charge for those services.

Plaintiff's respond that analysis of the organization of Sandicor and the Associations reveals they are separate entities because the Associations have interests diverse from each other and from Sandicor. Plaintiffs further maintain that

United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) establish that Sandicor is a "front" behind which the Associations engage in price fixing and other illegal restraints of trade and through which the Associations attempt to camouflage their collusive agreements.

One of the requirements for a violation of Section 1 is an agreement between two or more persons to restrain trade; unilateral conduct is not illegal. *Levine*, 72 F.3d at 1545. In *Copperweld*, the United States Supreme Court held that only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price-fixing combinations. *Copperweld*, 467 U.S. at 769-71; *City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274-75 (8th Cir. 1988). A conglomeration of two or more legally distinct entities cannot conspire among themselves where they pursue the common interests of the whole rather than those separate of the group itself. *Copperweld*, 467 U.S. at 769-71; *Mt. Pleasant*, 838 F.2d at 274-75. The form of organization, corporate or otherwise, does not control the question of whether there was joint conduct cognizable under the Sherman Act; rather, the economic reality should control the decision. *Copperweld*, 467 U.S. at 769-71; *Mt. Pleasant*, 838 F.2d at 275.

In *Mt. Pleasant*, for example, defendants were separate corporations comprising part of a rural electric cooperative. *Mt. Pleasant*, 838 F.2d at 271. The cooperative had three tiers, and at the top of the organizational chart was Associated Electric Cooperative, Inc. *Id.* The next tier consisted of six generation-and-transmission cooperatives ("G&Ts"), and the third tier contained 43 local retail-distribution cooperatives that bought wholesale power from the G&Ts and sold it to the cooperative's consumer-members in their service area. *Id.* In 1978, Associated's board of directors implemented a dual-rate structure for its electricity, where one rate was set for the rural members of the cooperative and a higher rate for surplus

power sold to nonmember municipalities. *Id.* at 272. The City of Mt. Pleasant sued, arguing in part that the dual price scheme was a "price squeeze" conspiracy. *Id.* at 270. The district court granted summary judgment on the conspiracy claim because the defendants were part of a single enterprise and therefore could not conspire among themselves. *Id.* The Eighth Circuit affirmed. Relying on *Copperweld*, the appellate court found that "the cooperative organization [was] a single enterprise pursuing a common goal—the provision of low-cost electricity to its rural consumer-members." *Id.* at 276.

One case Plaintiffs rely upon, *Topco*, presents a contrasting example of a "joining of two independent sources of economic power previously pursuing separate interests." There, the United States filed an injunction action against Topco, a cooperative association of about 25 small and medium-sized independent regional supermarket chains. *Topco*, 405 U.S. at 597-98. Each of the member chains operated independently and did not conduct business under the Topco name. *Id.* at 598. The cooperative's basic function was to serve as a purchasing agent for its members, and in that capacity, procured and distributed to its members food and related nonfood items, most of which had brand names owned by Topco. *Id.* The territories in which each of Topco's members could sell Topco-brand products was restricted. *Id.* at 598-604. The United States alleged that Topco's division of markets violated Section 1 because it operated to prohibit competition in Topco-brand products among grocery chains engaged in retail operations. *Id.* at 603. The Supreme Court agreed, finding that Topco's scheme of allocating territories to minimize competition at the retail level was an impermissible horizontal restraint. *Id.* at 606-12. The Court reasoned, "the Sherman Act gives to each Topco members and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desir-

able than competition in the sale of Topco-brand products. Without territorial restrictions, Topco members may indeed '(cut) each other's throats.'" *Id.* at 611 (alteration in original).

The *Topco* court relied on *Sealy*, another case Plaintiffs cite. In *Sealy*, a consortium of mattress and bedding manufacturers jointly owned and operated Sealy. *Sealy*, 388 U.S. at 352-55. Sealy licensed manufacturers of mattresses and bedding to make and sell products using the Sealy trademark. *Id.* Sealy agreed with the licensees not to license other manufacturers or sellers to sell Sealy-brand products in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated by Sealy. *Id.* The Court found the designation of mutually exclusive territories constituted an impermissible horizontal restraint. *Id.* at 355-58.

Defendants argue[11] that in the parallel state court action the California Court of Appeal conducted a thorough analysis under *Copperweld* and found that the combination of entities into Sandicor to provide the countywide MLS does not support a conspiracy theory of antitrust liability: "The combination of the local associations is a single enterprise whose members are interdependent (because its product arises only from the unified whole) and share the common purpose of creating and marketing the new product rather than a 'joining of two independent sources of economic power previously pursuing separate interests.'" *Freeman*, 77 Cal. App. 4th at 193 (*quoting Copperweld*, 467 U.S. at 771). While the state court decision is instructive, it is not dispositive in this case because the court there was reviewing the granting of a demurrer whereas this Court is presented with summary judg-

[11] To the extent the parties' arguments briefed in connection with Defendants' Motion Number 2 regarding Plaintiffs' state law claims are relevant, this Court has incorporated those arguments in analyzing this motion.

ment motions. Accordingly, this Court has before it evidence that was not before the state court. Nevertheless, the Court finds that the same conclusion—an absence of separate entities conspiring together—is warranted here.

The Court disagrees with Plaintiffs' position that the relationship between the Associations and Sandicor is an impermissible horizontal arrangement as in *Sealy* and *Topco*. In neither *Sealy* nor *Topco* were the restraints ancillary to the creation of a new product or service that could not have been created without joint conduct. In contrast, the evidence before the Court regarding Sandicor's creation shows it was created to provide a pro-competitive product. The Association shareholders joined to pursue the common goal of creating and administering a countywide MLS. (Barlow Decl. ¶¶ 5-17; Alkire Decl. ¶¶ 23-42.) This common goal could only be achieved by each of the Associations contributing their separate MLSs—each covering only a portion of San Diego County—to create a countywide MLS. (Barlow Decl. ¶¶ 5-17; Alkire Decl. ¶¶ 23-42.) Having come together to create a new product, the Associations could set a price for the countywide MLS. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.") Sandicor's fully integrated MLS has provided the maximum efficiency of the real estate market by permitting all licensed real estate professionals in San Diego County to have access to the same set of services at the same price. Indeed, Plaintiffs have repeatedly admitted that the Sandicor's MLS is procompetitive. (*See, e.g.*, Plts' Oppo. to Defs' Mot. for Sum. Judg't No. 3 at 7 ("Plaintiffs do not attack Sandicor or its MLS. In fact, plaintiffs recognize that Sandicor's MLS is procompetitive."); Plts' Oppo. to Defs' Mot. for Sum. Judg't No. 3 at 4 (agreeing with Defendants that Sandicor is useful and procompetitive); Plts' Oppo. to Defs' Mot. for Sum. Judg't

No. 3 at 20 ("plaintiffs and defendants both agree Sandicor still created major improvements in efficiency"). Because all licensed real estate professionals can now obtain countywide information, Sandicor's MLS, in short, has fostered more efficient competition among these professionals.

In opposing the Defendants' motions, Plaintiffs claim that the interests of the Associations and Sandicor diverged on numerous occasions, revealing a basic conflict of interest between Sandicor and the Associations. Plaintiffs cite several instances of these alleged conflicting interests. The first conflicting interest occurred when the Associations allegedly agreed on June 17, 1991, to overcharge Sandicor by over $1.2 million. Next, Plaintiffs argue that the interests of the overcharged Associations diverged from those of Fallbrook and Valley Center when the latter two benefitted from the overcharges to thousands of MLS users in other Associations. Third, Plaintiffs state that the interests of SDAR and Sandicor and the other Associations diverged when SDAR attempted to lower prices by offering refunds on educational courses to its MLS users, and Sandicor forbade that program. Fourth, Plaintiffs argue that the interests of SDAR diverged from Sandicor when SDAR demanded that the price fixing and subsidies end and took steps to start its own MLS in competition with Sandicor. Fifth, when "board of choice" came to San Diego in 1994, Plaintiffs state the Associations began to compete with one another. Sixth, Plaintiffs state the interests of Sandicor and the Associations diverged on who would bear the risk of loss on bad checks. Plaintiffs' seventh example is that Sandicor repeatedly urged changes to lessen the effects of price fixing, including that the Associations return to the pre-Sandicor financial model, where Sandicor invoiced each Association for its share of MLS costs, and each Association add on its own service center costs to its own MLS users. The eighth instance is that Defendant East San Diego County Association of Realtors accused Sandicor of restraint of trade with the adoption of office pricing, and

invited an investigation by the District Attorney. Finally, Plaintiffs state the most explosive conflict between Sandicor and the Associations came when Sandicor drafted and attempted to implement the IntelliQuick plan.

The Court does not find the Plaintiffs' arguments persuasive. First, for the reasons discussed above, the evidence does not support Plaintiffs' theory that the Associations sold service center functions to Sandicor. Further, that the Associations have had diverse interests and may argue among themselves does not undermine a finding that Sandicor is a single enterprise. In *Mt. Pleasant*, for example, when Associated decided to implement its dual-rate structure, two board members objected on the grounds the rates were discriminatory and unfair. *Mt. Pleasant*, 838 F.2d at 276. In addition, some of the distribution cooperatives disputed how to divide the profits earned on sales to municipalities even before Associated implemented the dual-rate system. *Id.* at 277. The court found that while these disputes indicated there were "diverse" interests, they did not create a triable issue of fact as to whether the companies were part of a single enterprise. *Id.* The court stated that "[i]t will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests," but that their coordination was still not a "joining of two independent sources of economic power previously pursuing separate interests":

> Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that the are *independent sources* of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent.

Id.

Under *Mt. Pleasant*, Plaintiffs' examples of negotiations and disagreements on the operational responsibilities and division of economic proceeds do not establish or create a triable issue of material fact regarding whether the Associations were part of a single enterprise in creating and maintaining Sandicor. *See Mt. Pleasant*, 838 F.2d at 277. Accordingly, Plaintiffs' first, second, third, fourth, sixth, and seventh instances of divergent interests do not persuade this Court there was or might have been impermissible joint conduct. Similarly, Plaintiffs' citation to the IntelliQuick plan does not save their case. The Associations' consideration and rejection of the IntelliQuick plan is another example of the type of dispute among the Associations that, under *Mt. Pleasant*, does not undermine a finding of interdependency. *See id.* Further, Plaintiffs' reliance on East San Diego County's accusations of anticompetitive activity also fails under *Mt. Pleasant*. In *Mt. Pleasant*, the Eighth Circuit found that two board members' strenuous objections to a dual rate structure and charges that the structure was discriminatory and unfair did not create a triable issue of material fact on whether the companies were part of a single enterprise. *Id.* 276-77. *Mt. Pleasant*, therefore, compels a similar finding here—that East San Diego County's accusations do not create a triable issue as to whether the Associations had divergent interests.

In addition, the fact the Associations compete with one another for members is irrelevant. Competition for members is outside the scope of the Associations' joint venture (*i.e.*, a countywide MLS). It is only where separate entities combine to restrain trade in products or services in which they had previously been actual or potential competitors that there is a "joining of two independent sources of economic power previously pursuing separate interests." *Copperweld*, 467 U.S. at 771; *Freeman*, 77 Cal. App. 4th at 191. Therefore, Plaintiffs' reference to the competition for members fostered by "board of choice" does not support a finding of an illegal agreement or trial on that issue.

3. Conclusion.

The Court concludes Plaintiffs have not established or created a triable issue of material fact regarding whether the Associations sell service center functions to Sandicor and thereby adversely affect the price of Sandicor's MLS. Rather, the evidence shows that the service center functions Plaintiffs refer to are in fact part of Sandicor's MLS. Further, the Court finds there are no triable issues of material fact that the Associations are not separate entities pursuing separate interests that conspired to create Sandicor. The facts demonstrate that the Associations joined together to form a new product that did not previously exist: a countywide MLS. As in *Mt. Pleasant*, the individual Associations are not independent sources of countywide MLSs or compete on the price for those services. Indeed, the countywide MLS could only be created by each of the Associations contributing their MLSs. Notwithstanding the disputes between the Associations on how to "divide the spoils of their economic power," the Court finds the Associations were part of a single enterprise. Accordingly, the Court finds there is no triable issue of material fact that there is not the plurality of separate entities necessary for Plaintiffs' price fixing claim. Plaintiffs' Section 1 claim therefore fails as a matter of law, and it is unnecessary to analyze the claim under either the rule of reason or *per se* test. Defendants' Motion Number 3 is GRANTED and Plaintiffs' motion for partial summary judgment is DENIED as to Plaintiffs' Section 1 claim.

III. Section 2 Claim.

The parties have filed cross-motions for summary judgment on Plaintiffs' Section 2 claim. The Second Amended Complaint alleges the "Defendants conspired to monopolize the market for MLS services, Enhanced Services." (SAC ¶ 159.) Plaintiffs also allege that Defendants monopolized the market for MLS services in San Diego County. (SAC ¶ 162.) The Second Amended Complaint maintains that Sandicor's

MLS is a natural monopoly and that Defendants have engaged in predatory conduct to extend the reach of Sandicor's MLS. (SAC ¶¶ 163-64,) In their briefs for these motions, Plaintiffs contend the Associations had 100% of the market for selling service center functions to Sandicor, and that the Associations had the power to raise prices and did so commencing on June 17, 1991. Plaintiffs also argue that the Associations prevented competition to themselves by voting down the IntelliQuick plan and by rejecting Plaintiff Freeman's application to become a new service center.

Defendants contend that Plaintiffs' reference to Section 2 of the Sherman Act is almost in passing, and not sufficient to save their claims. Plaintiffs respond that the cause of action is a significant part of the case because they will be seeking an injunction prohibiting Sandicor from setting the price for service center functions and for the Associations to bill and collect their own service center fees. (Plts' Reply to Mot. for Part. Sum. Judg't at 7.)

With the exception of citing a case for the definition of "monopolize," Plaintiffs have not cited any authority in support of their summary judgment motion or in opposition to Defendants' summary judgment motion to support their position that the actions complained of constitute Section 2 violations. The Court will therefore analyze Plaintiffs' arguments keeping in mind it is not obligated "to scour the party's various submissions to piece together appropriate arguments . . . [or] make the lawyer's case," *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (holding it would be unfair to the district court and the party moving for summary judgment if the district court is required to search the entire record for a genuine issue of fact even though the nonmoving party has not set it out in its opposition papers).

A. Applicable Law.

To succeed on their claim for actual monopolization under Section 2, Plaintiffs must prove Defendants: "(i) possessed monopoly power in the relevant markets; (ii) willfully acquired or maintained [their] monopoly power through exclusionary conduct; and (iii) caused antitrust injury." *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997); *Smilecare Denial Group v. Delta Dental Plan of California*, 88 F.3d 780, 783 (9th Cir. 1996). To prevail on a claim for conspiracy to monopolize, the plaintiff must show defendants had a specific intent to monopolize as well as anticompetitive acts to effect that intent. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1491 (9th Cir. 1991). Monopoly power is "'the power to control prices or exclude competition.'" *American Prof'l*, 108 F.3d at 1154 (*quoting United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

B. Excessive Prices.

Plaintiffs contend the Associations had 100% of the market for selling service center functions and they unlawfully fixed the prices for those services and overcharged Sandicor, causing Sandicor to pass on the excessive prices to real estate professionals who purchased Sandicor's MLS. For the reasons discussed above, this Court has rejected Plaintiffs' characterization of Sandicor as a purchaser of "service center functions" from the Associations. Rather, the evidence in the record supports only one conclusion: that the Service Center Agreements between Sandicor and the Associations require the latter to deliver Sandicor's MLS to Sandicor's participants. Because there are no triable issues of material fact that the price set for Sandicor's countywide MLS service was

set by Sandicor, and not the Associations, the Court must analyze Plaintiffs' Section 2 claim as challenging the price Sandicor charges for its MLS services.

Plaintiffs have admitted that Sandicor is procompetitive. *(See, e.g.*, Plts' Oppo. to Defs' Mot. for Sum. Judg't No. 3 at 7 ("Plaintiffs do not attack Sandicor or its MLS. In fact, plaintiffs recognize that Sandicor's MLS is procompetitive."); Plts' Oppo. to Defs' Mot. for Sum. Judg't No. 3 at 4 (agreeing with Defendants that Sandicor is useful and procompetitive); Plts' Oppo. to Defs' Mot. for Sum. Judg't No. 3 at 20 ("plaintiffs and defendants both agree Sandicor still created major improvements in efficiency"). They further admit they do not challenge Sandicor's decision to charge a single price for its MLS Services. (Plts' Oppo. to Defs' Mot. for Sum. Judg't No. 3 at 4-5 ("plaintiffs do not attack Sandicor's right to charge a single price for a single service throughout the county").) Finally, Plaintiffs admit Sandicor is a natural monopoly. (SAC ¶ 163.) These admissions undermine their Section 2 claim for excessive prices.

The Sherman Act does not prohibit every monopoly, but rather renders unlawful only those monopolies attained or perpetuated by predatory practices. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547-48 (9th Cir. 1991); *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026, 1034 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993). Thus, antitrust laws tolerate efficient monopolies and natural monopolies. *Alaska Airlines*, 948 F.2d at 548, and "there is nothing inherently anti-competitive about having a monopoly over the supply of one's own products." *Williams*, 794 F. Supp. at 1034. "A firm that creates a valued service or product should not be punished with treble damages and criminal sanctions merely because the firm finds itself to be the holder of a natural monopoly." *Alaska Airlines,* 948 F.2d at 548 (*citing United States v. Aluminum Co. of America*, 148 F.2d 416, 429-30 (2d Cir. 1945)). The Seventh Circuit has similarly

noted that "[a] natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of 'monopolizing' in violation of the Sherman Act." *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995).

Because Sandicor's MLS is a natural monopoly, its price, even if it is excessive, does not violate antitrust laws. Courts have long held that the Sherman Act does not regulate the prices charged by a natural monopolists. *E.g., Aluminum*, 148 F.2d at 429-30. For example, in 1979 the Second Circuit explained that a monopolist who obtained its market power through legitimate means did not violate Section 2 solely because its prices were deemed excessive:

> Excessive prices, maintained through exercise of a monopolist's control of the market, constituted one of the primary evils that the Sherman Act was intended to correct. Where a monopolist has acquired or maintained its power by anticompetitive conduct, therefore, a direct purchaser may recover the overcharge caused by the violation of § 2.
>
> But unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979) (internal citations omitted). "[A]ntitrust laws are not a price-control statute," *Blue Cross*, 65 F.3d at 1413,

and "setting high prices in the original 'monopoly' market[] represent[s] the cost that we incur when we permit efficient and natural monopolies." *Alaska Airlines*, 948 F.2d at 548-59. A legitimate monopolist does not have a duty to reduce its prices or keep them low; "a lawful monopolist can charge what it wants." *Blue Cross*, 65 F.3d at 1415. The Seventh Circuit has even noted that a monopolist's raising of prices is a procompetitive act because it makes a greater opening for competitors. *Blue Cross*, 65 F.3d at 1413. Courts have also concluded that "judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us." *Berkey*, 603 F.2d at 294; *accord, Alaska Airlines*, 948 F.2d at 548. Accordingly, the Court finds there is no triable issue of material fact that the price charged for Sandicor's MLS does not violate Section 2.

C. Rejection of the IntelliQuick Plan.

Plaintiffs contend that the decision to vote down the IntelliQuick plan supports their claim under Section 2. (Plts' Mot. for Part. Sum. Judg't at 18.) According to Plaintiffs, that decision prevented competition to the Associations. *Id.* Plaintiffs cite no authority to support their suggestion this decision was unlawful.

Defendants, in contrast, have presented evidence showing there were legitimate business reasons for refusing to adopt the IntelliQuick plan. In part, the directors found the IntelliQuick business plan "conflicted with the fundamental principles upon which Sandicor was founded and the basis on which SDAR agreed to participate in the Sandicor venture." (Alkire Decl. ¶ 64.) Plaintiffs also admit that Sandicor could choose to reject IntelliQuick. In opposing Defendants' motion for summary judgment, Plaintiffs undermine their case by admitting that "we do not assert that the Sherman Act compelled Sandicor to adopt the IntelliQuick plan or any par-

ticular variation of it." (Plts' Oppo. to Def's Mot. for Sum. Judg't No. 3 at 8.)

Based on this record, the Court finds that Plaintiffs have not established or created a triable issue of material fact that the rejection of IntelliQuick supports their monopolization claim.

D. Refusal to Authorize Plaintiff Freeman.

Plaintiffs also argue that Defendants' refusal to allow Plaintiff Freeman to run a service center supports their claim under Section 2. But Plaintiffs have not cited any authority suggesting this decision violates the Sherman Act. Construing Plaintiffs' allegations liberally, they appear to rely on a theory of refusal to deal. A refusal to deal can violate Section 2 only in narrow circumstances: *Smilecare Dental Group v. Delta Dental Plan of Cal.*, 858 F. Supp. 1035, 1041 (C.D. Cal. 1994), *aff'd*, 88 F.3d 780 (9th Cir. 1996). Competitors generally do not have a duty to deal with each other. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-01 (1985). But Section 2 prohibits a monopolist's refusal to deal "if that conduct harms the competitive process in the absence of a legitimate business justification." *Image Technical Servs. Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209 (9th Cir. 1997); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *accord, Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951); *Aspen Skiing*, 472 U.S. at 601-02; *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.*, 61 F. Supp. 2d 1058, 1065 (N.D. Cal. 1999).

Plaintiff's reliance on Defendants' refusal to allow Plaintiff Freeman to operate a service center is unpersuasive. First, Plaintiff Freeman has admitted in prior briefs before the Court that she did not in fact intend to operate a service center and that her offer to do so "was entirely a gambit to break the

unlawful monopoly of defendants." (Plts' (8/8/00) Mot. for Class Cert. at 11.) Second, Courts have long recognized that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Colgate*, 250 U.S. at 307; *accord, Lorain Journal*, 342 U.S. at 155; *Aspen Skiing*, 472 U.S. at 602. Plaintiffs make the conclusory argument in their briefs that Sandicor's purpose in precluding Plaintiff Freeman from operating a service center was to stifle competition. Plaintiffs however, have not presented any evidence to support that contention.

E. Conclusion.

Plaintiffs have not presented any legal authority suggesting that the conduct complained of constitutes an unlawful monopolization. Because Plaintiffs admit Sandicor's MLS is a natural monopoly, the price charged for the countywide listing service does not violate antitrust laws. Further, even a generous construction of Plaintiffs' arguments regarding the IntelliQuick plan and Plaintiff Freeman's operation of a service center does not save the cause of action. Defendants have presented evidence showing that the rejection of the IntelliQuick plan was based on legitimate business reasons. Further, it appears Plaintiff Freeman never wanted to operate a service center, and there is no evidence indicating Defendants' refusal to authorize her was to injure competition. The Court further notes that Plaintiffs' claim for conspiracy to monopolize fails for the additional reason that this Court has already concluded the Defendants did not conspire under Section 1. *See Morgan, Strand, Wheeler & Biggs*, 924 F.2d at 1491. Accordingly, all Defendants are entitled to summary judgment as a matter of law as to Plaintiffs' cause of action

under Section 2. Defendants' Motion Number 3 is therefore GRANTED and Plaintiffs' motion for partial summary judgment is DENIED as to Plaintiffs' Section 2 claim.

THE STATE LAW CAUSES OF ACTION AND THE PARTIES' REMAINING MOTIONS

The Court has granted Defendants' motion for summary judgment as to Plaintiffs' Sherman Act claims, which formed the basis for the Court's jurisdiction over this case. The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law causes of action and hereby DISMISSES Plaintiffs' state law claims. *See* 28 U.S.C. § 1367(c) (court may decline to exercise supplemental jurisdiction over state raw claims where it has dismissed the claims on which its original jurisdiction was based).

The Association Defendants and CAR have filed additional motions for summary judgment that challenge Plaintiffs' claims as they pertain to particular Defendants. In light of the Court's rulings granting summary judgment in Defendants' favor as to Plaintiffs' Section 1 and Section 2 claims, the remaining motions challenging these claims are hereby DENIED AS MOOT. The Defendants' motions challenging the state law claims are DENIED WITHOUT PREJUDICE AS MOOT in light of the Court's dismissal of those claims.

Defendant Alkire has filed a separate motion for summary judgment. That motion is MOOT in light of the Court's rulings. In addition, because Defendant Alkire is currently in bankruptcy, that motion is DENIED WITHOUT PREJUDICE.

Plaintiffs' motion for summary judgment is DENIED as to Plaintiffs' Sherman Act claims, and DENIED WITHOUT PREJUDICE as to their state law claims. In light of the Court's rulings, Plaintiffs' motion for permanent injunction is DENIED.

CONCLUSION

For the foregoing reasons, having considered the parties' briefs and argument of counsel, applicable law, the record, and good cause appearing, IT IS HEREBY ORDERED.

1. Plaintiffs' group boycott and tying claims are DISMISSED WITH PREJUDICE.

2. Defendants' motion to dismiss for lack of subject matter jurisdiction is DENIED [docket no. 462].

3. Defendants' motion for summary judgment as to Plaintiffs' Sherman Act claims is GRANTED as to ALL DEFENDANTS [docket no. 466].

4. Defendants' remaining motions for summary judgment are DENIED AS MOOT as to the Sherman Act claims and DENIED WITHOUT PREJUDICE AS MOOT as to the state law claims that this Court has dismissed [docket nos. 464, 468, 470, 472].

5. Defendants' motion to supplement the answer is GRANTED [docket no. 460]. In light of the Court's disposition of Defendants' summary judgment motions, however, Defendants do not need to file a supplemental answer.

6. Plaintiffs' state law causes of action for violation of the Cartwright Act and California's Unfair Competition Act are DISMISSED under 28 U.S.C. § 1367.

7. Plaintiffs' motion for summary judgment is DENIED as to their Sherman Act claims, and DENIED WITHOUT PREJUDICE as to their state law claims [docket no. 456].

8. Plaintiffs' motion for permanent injunction is DENIED [docket no. 502].

9. Plaintiffs' objections to the Declarations of Anita Alkire, June Barlow, John Holley, Diane McMillan, and Mark Marchand are OVERRULED insofar as the Court has relied upon those declarations in its analysis.

10. Defendants' request for judicial notice is GRANTED insofar as the Court has relied on the documents subject to the request.

11. The Clerk of the Court is directed to enter judgment in accordance with this order.

IT IS SO ORDERED.

Dated: 6/27/01 /s/ M. James Lorenz
M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE

COPY TO:

HON. JOHN A. HOUSTON
UNITED STATES MAGISTRATE JUDGE

all counsel

APPENDIX C

COURT OF APPEAL, FOURTH DISTRICT
DIVISION 1, CALIFORNIA

No. D030553

ARLEEN FREEMAN *et al.*,
Plaintiffs and Appellants,
v.
SAN DIEGO ASSOCIATION OF REALTORS *et al.*,
Defendants and Respondents.

Dec. 27, 1999

Rehearing Denied Jan. 24, 2000
Review Denied April 12, 2000 *

McDONALD, J.

Defendant Sandicor, Inc. (Sandicor) operates a real estate sales multiple listing service (MLS) covering San Diego County. Real estate agents pay a monthly fee to access Sandicor's MLS listings. Plaintiff real estate agent Arleen Freeman filed this action, alleging that defendants Sandicor, San Diego Association of Realtors (SDAR) and several other real estate associations and individuals (collectively

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* Mosk, J., and Kennard, J., dissented.

defendants)[1] violated California's antitrust laws[2] by charging excessive fees for access to Sandicor's MLS (the price fixing, tying and market exclusion claims) and refusing Freeman's request to become a service center for Sandicor (the group boycott claim). Freeman's lawsuit also asserted the excessive charges for MLS access violated an extant permanent injunction and entitled Freeman to damages. The trial court sustained defendants' demurrers to Freeman's third amended complaint and dismissed the action. Freeman timely filed a notice of appeal.

We evaluate whether the facts alleged by Freeman state causes of action against defendants.

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[1] Freeman alleged that SDAR and four other realtor associations (collectively, the local associations), the shareholders of Sandicor and operators of the service centers (see infra, at part ID), participated in agreements and actions that violate the California antitrust laws. Freeman also alleged that various individuals were directors of either Sandicor or one of the local associations (the "director defendants") and that the director defendants were personally liable as independent participants in the alleged antitrust violations.

[2] Business and Professions Code section 16700 et seq., hereinafter the Cartwright Act.

I.

FACTUAL BACKGROUND [3]

A. *The MLS*

The MLS is a computerized medium by which real estate agents exchange information on properties that are for sale or have been recently sold. Real estate agents who have listings to sell properties may submit information to the MLS to advertise the properties for sale, and real estate agents seeking properties for buyers can use the MLS to search for properties

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[3] Our factual statement is drawn from the facts alleged in Freeman's third amended complaint as modified or amplified by facts that may be judicially noticed. When examining the sufficiency of a complaint against a general demurrer, we treat as true all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, 271 Cal.Rptr. 146, 793 P.2d 479. However, we disregard allegations that are contrary to law or to facts that may be judicially noticed (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955, 199 Cal.Rptr. 789) or are contradicted by the express terms of an exhibit incorporated into the complaint. (*Alphonzo E. Bell Corp. v. Bell etc. Synd.* (1941) 46 Cal.App.2d 684, 691, 116 P.2d 786.) Because the operative pleading was Freeman's fourth iteration of her claims, she may not avoid defects of her earlier pleadings by omitting facts that made the earlier pleadings defective or alleging new facts inconsistent with the allegations of the earlier pleadings. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384, 243 Cal.Rptr. 627 [when plaintiff pleads inconsistent facts without explaining the inconsistency the court will read into the amended complaint the facts alleged in the superseded complaint].) Moreover, when affidavits or exhibits filed by a plaintiff may be judicially noticed, the court may consider those facts to assess whether the complaint survives a general demurrer. (*Dwan v. Dixon* (1963) 216 Cal.App.2d 260, 264-265, 30 Cal.Rptr. 749 [allegation of complaint that defendant put plaintiff in the car and aided and assisted him to drive disregarded because plaintiff's affidavit in action showed defendant did not put plaintiff in the car or aid or assist him to drive]; *Hill Trans. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 710-711, 72 Cal.Rptr. 441 [court may consider exhibits to superseded pleading].)

that meet the buyers' criteria for location, size, price and other characteristics.

B. *Palsson, NAR I and NAR II*

Because Freeman's claims are based in substantial part on prior legal decisions that concluded certain MLS practices violated antitrust laws, we summarize those decisions.

In *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 130 Cal.Rptr. 1, 549 P.2d 833 (hereafter *Palsson*) a realtors' association operated the only MLS for Marin County. The association permitted only members of the association to use the MLS and denied membership to persons who were only part-time real estate agents. *Palsson* concluded that denial of MLS access to nonmembers constituted a restraint of trade, and that the restrictions on access and membership did not pass the "rule of reason" test. (*Id.* at pp. 934-940, 130 Cal.Rptr. 1, 549 P.2d 833.) *Palsson* ordered that the "rules denying access of nonmembers to the [MLS] must be eliminated, although nonmembers may be charged a reasonable fee for use of the service consistent with the per-capita costs of operation." (*Id.* at p. 940, 130 Cal.Rptr. 1, 549 P.2d 833.)

In *People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 174 Cal.Rptr. 728 (hereafter *NAR I*) this court concluded that certain policies of SDAR [4] violated California's antitrust laws. *NAR I* held: (1) SDAR's rule that limited access to its residential MLS to SDAR members was an unlawful group boycott (*id.* at pp. 467-468, 174 Cal.Rptr. 728); (2) SDAR's rule permitting only "exclusive right to sell" listings on the MLS was an unlawful restraint on trade (*id.* at pp. 477-479, 174 Cal.Rptr. 728); and (3) certain SDAR policies and practices facilitated price fixing of brokers' commissions (*id.* at pp. 479-487, 174 Cal.Rptr. 728). *NAR I*

[4] At that time, SDAR was called San Diego Board of Realtors.

remanded the case to the trial court with directions to issue an injunction "as generally contained in [paragraph 1(a) of] the prayer of the second amended complaint . . . ." [5] (120 Cal.App.3d at p. 488, 174 Cal.Rptr. 728.)

In *NAR I* the court also opined that SDAR's rule limiting access to its investment property MLS to SDAR members could constitute an unlawful tying arrangement and on remand directed the trial court to make a factual determination whether SDAR held sufficient economic power over the tying product (the investment property MLS) to restrain trade in the tied product (association membership). (*Id.* at pp. 469-473, 174 Cal.Rptr. 728.) On remand, the trial court found no unlawful tying arrangement. However, in the subsequent appeal this court in *NAR II* concluded that conditioning access to the investment property MLS on membership in SDAR was an unlawful tying arrangement. In *NAR II* we ordered that the injunction be modified to permit access to the investment property MLS on the same terms as access to the residential MLS. (155 Cal.App.3d at p. 589, 202 Cal.Rptr. 243.)

On remand of *NAR II*, the trial court issued its 1984 injunction ordering that access to SDAR's residential MLS and investment property MLS be available on an equal footing to all licensed real estate agents without regard to SDAR membership. The injunction permitted SDAR to impose reasonable charges for access to each MLS, including an allocation of overhead costs of operating the MLS,

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[5] The precise contours of the injunction are not included in the record. However, *People v. National Association of Realtors* (1984) 155 Cal. App.3d 578, at page 582, footnote 2, 202 Cal.Rptr. 243 (hereafter *NAR II*) recited that paragraph 1(a) of the prayer of the second amended complaint sought to enjoin SDAR from "'refusing access to any licensed [real estate agents] to the [MLS] . . . or from imposing costs to any such [real estate agents] for the listing or use of such a service beyond the cost of providing the service itself. . . .'"

provided that charges to members and nonmembers were made on the same basis.

C. *The Creation of Sandicor*

Prior to 1992 there were eleven regional associations of real estate agents in San Diego County. These associations operated three separate MLS's, each of which provided a partial and fragmented listing of the real estate for sale in San Diego County.

In December 1991 the local associations combined their separate MLS's and created a new product: a single, county-wide MLS listing all properties for sale throughout San Diego County. To create this new product, the local associations formed Sandicor, a corporate entity in which they were shareholders.[6] Sandicor owns and operates a county-wide MLS. Sandicor's MLS is an essential tool for real estate agents, and nearly all real estate agents actively engaged in buying or selling real estate in San Diego County use Sandicor's MLS.

Real estate agents pay Sandicor a uniform monthly fee set by Sandicor to use Sandicor's MLS. The monthly fee is used to pay the costs of operating the MLS and Sandicor's service centers (see, infra at section D).[7]

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[6] Freeman asserts Sandicor's separate existence should be disregarded because it is a sham corporation, and that Sandicor should instead be treated as a partnership of the constituent associations.

[7] Although Freeman's third amended complaint alleged real estate agents pay a monthly fee to Sandicor for MLS access and a separate monthly fee to the local associations for "Enhanced Services," her second amended complaint (as well as the exhibits filed by Freeman in support of her motion for class certification) alleged that real estate agents pay their monthly fee to Sandicor. A portion of that fee is retained by Sandicor to pay the direct costs of operating the MLS computer system, and the other portion of that fee is used by Sandicor to pay the local associations that have contracted with Sandicor to act as service centers for subscribers to Sandicor's MLS.

D. *The Alleged Tying Arrangement: The Enhanced Services*

Some local associations have contracted with Sandicor to act as service centers to perform services for Sandicor and its MLS subscribers that Freeman denominates as "Enhanced Services." Enhanced Services performed by the service centers include: processing enrollment forms and collecting enrollment fees for subscribers to Sandicor's MLS and maintaining records on these participants; billing and collecting monthly fees from subscribers and remitting fees to Sandicor; inputting MLS listings into Sandicor's MLS database when requested by a subscriber; monitoring listings for compliance with Sandicor's rules; providing forms for Sandicor's MLS complaints and forwarding complaints to Sandicor; distributing MLS books to subscribers; stocking and distributing Sandicor property data profile sheets and other Sandicor forms and supplies; providing staff to answer questions by subscribers; providing meeting facilities on request by Sandicor; processing reciprocal listings on properties within the local association's jurisdiction from subscribers to other MLS's that have reciprocity agreements with Sandicor; and, when a Sandicor subscriber has a listing on a property outside Sandicor's jurisdiction but within the jurisdiction of another MLS with which Sandicor has a reciprocity agreement, to process that listing with the other MLS.

Freeman alleged that these Enhanced Services, although forming a portion of the benefits available to Sandicor's MLS subscribers, augmented and supplemented the MLS but were unnecessary to the use of the MLS; they were instead distinct and separate services. Freeman also alleged that the Enhanced Services were almost entirely worthless to subscribers; that subscribers would not have purchased these services if given the choice; and that the subscribers paid for the Enhanced Services only because Sandicor would not sell access to the MLS separately from the Enhanced Services.

Freeman's tying claim alleged: Sandicor conditioned sale of access to its MLS (the tying product) on purchase of the Enhanced Services (the tied product); Sandicor had sufficient economic power to force real estate agents wishing to purchase MLS access to also purchase the Enhanced Services; and a not insubstantial amount of sales in the tied product was effected by the tying arrangement.

E. *The Alleged Price Fixing*

Freeman alleged Sandicor's corporate form was a sham that should be disregarded and treated instead as a partnership of the local associations. Based on this premise, Freeman alleged the local associations were separate entities holding competing economic interests and each agreed with the others to eliminate price competition for Sandicor's MLS by fixing the price for the MLS and Enhanced Services at a uniform rate.

F. *The Alleged Market Exclusion*

Freeman alleged Sandicor's fee for access to its MLS is excessive and violates the antitrust laws by excluding brokers who cannot afford to subscribe; as a result trade is restrained by limiting the number of competing brokers.

G. *The Alleged Group Boycott*

Several months after Freeman filed this class action lawsuit, Freeman asked Sandicor to appoint her to act as a service center. She promised to provide the MLS and Enhanced Services to her customers at rates lower than those charged by the other service centers. Sandicor refused to appoint her as a service center. Freeman alleged the local associations combined to cause Sandicor to refuse Freeman's request, and the combined action constituted a group boycott of Freeman.

H. *Violation of the Injunction*

Freeman alleged that the 1984 injunction resulting from our decision in *NAR II* required SDAR to charge only a reasonable amount for access to the MLS, and that by including charges for Enhanced Services that were worthless to Freeman the charge imposed for access to Sandicor's MLS exceeded the amount permitted under the injunction.

II.

PROCEDURAL HISTORY

All defendants demurred to Freeman's third amended complaint. The trial court sustained the demurrers of Sandicor and the local associations in part because the complaint did not allege facts sufficient to show the defendants had separate and distinct interests with respect to the conduct alleged or that there were separate products or services that had been tied together. The court granted Freeman leave to amend to cure these defects.[8] Freeman elected not to amend, and the court dismissed the complaint.

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[8] The court sustained the demurrers of the director defendants without leave to amend because it concluded that the complaint did not adequately allege specific overt acts in furtherance of the conspiracy as required by *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 70 Cal.Rptr. 849, 444 P.2d 481. Because we conclude the trial court correctly sustained the demurrers of Sandicor and the local associations to Freeman's complaint, and Freeman makes no argument that her claims against the director-defendants survive dismissal of her other antitrust claims, it is unnecessary separately to evaluate the claims against the director-defendants.

III.

ANALYSIS OF ANTITRUST CLAIMS [9]

A. *The Complaint Did Not State an Illegal Tying Claim*

The complaint alleged that packaging Enhanced Services with access to the MLS data as a single product, and refusing to sell access to the MLS data separately from the Enhanced Services, constituted an unlawful tying arrangement in violation of the Cartwright Act. The demurrers argued that because the complaint on its face showed the Enhanced Services and the MLS data constituted a single unitary service rather than normally separate services, the complaint did not state a tying claim.[10]

1. Applicable Principles

A tying arrangement under antitrust laws exists when a party agrees to sell one product (the tying product) on the condition that the buyer also purchases a different product (the tied product), thereby curbing competition in the sale of the tied product. (*Northern Pacific Railway Company v. United States* (1958) 356 U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545.) Antitrust laws against tying arrangements seek to eradicate the evils that (1) competitors are denied free access

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[9] In analyzing Freeman's Cartwright Act claims we frequently examine federal precedent because the Cartwright Act is similar in language and purpose to the Sherman Act. (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal. App.3d 7, 19, 126 Cal.Rptr. 327.) However, federal precedents must be used with caution because the acts, although similar, are not coextensive. (*State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1152-1169, 252 Cal.Rptr. 221, 762 P.2d 385.)

[10] SDAR also argued that because Freeman's complaint affirmatively alleged the local associations were the only parties benefiting from sale of the Enhanced Services, the complaint was fatally defective because a tying claim requires the party selling the tying product have a financial interest in the sale of the tied product. SDAR does not resurrect this argument on appeal.

to the market for the tied product not because the seller imposing the tying requirement has a better or less expensive tied product, but because of the seller's power or leverage in the market for the tying product; and (2) buyers are forced to forgo their free choice between competing tied products. (*Ibid.*) Tying arrangements are illegal per se "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" (*id.* at p. 6, 78 S.Ct. 514), and when "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie. . . ." (*Fortner Enterprises v. U.S. Steel* (1969) 394 U.S. 495, 501, 89 S.Ct. 1252, 22 L.Ed.2d 495.)

The threshold element for a tying claim is the existence of separate products or services in separate markets. (*Jefferson Parish Hospital Dist. No. 2 v. Hyde* (1984) 466 U.S. 2, 21, 104 S.Ct. 1551, 80 L.Ed.2d 2.) Absent separate products in separate markets, the alleged tying and tied products are in reality a single product. (*Hirsh v. Martindale-Hubbell, Inc.* (9th Cir. 1982) 674 F.2d 1343, 1350.)

Assuming that separate products in separate markets exist, a plaintiff claiming an illegal tying arrangement must plead: "(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product." (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 542, 161 Cal.Rptr. 811.)

2. Analysis

We conclude Freeman's complaint, read in the context of the facts of which we may take judicial notice, and shorn of

its conclusory allegations,[11] did not adequately allege an illegal tying arrangement. The alleged facts do not demonstrate that (1) access to Sandicor's MLS data and the Enhanced Services are separate products for which separate markets exist, or that (2) the tie affected a substantial volume of commerce in the market for the tied product.

The complaint alleged, and in opposition to the demurrers Freeman argued, the Enhanced Services as a whole constituted the separate tied product, and that the tie involved

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[11] The complaint did allege the raw MLS data and the Enhanced Services were separate products and that the total yearly amount of sales of the Enhanced Services was "not insubstantial." Freeman argues that on demurrer the court must accept these allegations as true. Although a court must on demurrer accept as true properly pleaded facts, a demurrer does not admit contentions or conclusions of law or fact. (*Chicago Title Ins. Co. v. Great Western Fin. Corp., supra,* 69 Cal.2d at p. 327, 70 Cal.Rptr. 849, 444 P.2d 481.) The plaintiff must allege facts that, if proven, demonstrate the products occupy separate markets, and conclusory allegations of "separateness" are insufficient. (*Lee v. Life Ins. Co. of North America* (D.R.I. 1993) 829 F.Supp. 529, 537 [Sherman Act tying claim dismissed at pleading stage where complaint contained conclusory allegation of "separateness"]; *Nordic Bank PLC v. Trend Group, Ltd.* (S.D.N.Y. 1985) 619 F.Supp. 542, 568 [same].) Freeman urges that *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 94 Cal.Rptr. 785, 484 P.2d 953 held that separateness is always a question to be resolved by the trier of fact and it is therefore improper to resolve the issue at the pleading stage. However, *Corwin* held only that triable issues of fact on the issue of separateness were present in that case (*id.* at pp. 855-859, 94 Cal.Rptr. 785, 484 P.2d 953) but did not hold that the question of separateness can never be resolved as a matter of law. Indeed, *Corwin's* discussion of this issue relied on *Times-Picayune Pub. Co. v. United States* (1953) 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277, in which the court determined as a matter of law the products were not separate. (*Id.* at pp. 613-615, 73 S.Ct. 872.) *Corwin* does not stand for the broad proposition urged by Freeman. Because the courts have resolved the issue of separateness as a matter of law under appropriate circumstances (see *Wells Real Estate v. Greater Lowell Bd. of Realtors* (1st Cir. 1988) 850 F.2d 803, 814-815), "separateness" is not invariably a factual issue insulating the complaint from scrutiny on demurrer.

a "not insubstantial amount of sales in terms of the total dollar value of 'Enhanced Services.'"

On appeal, however, Freeman shifts her theory to argue that each component part of the Enhanced Services must be severally evaluated to assess the viability of her tying claim. She concedes that many components of the Enhanced Services do not comprise a service severable from access to the MLS, and has abandoned her claim of an illegal tie as to those components.[12] However, she argues her tying claim for other components of the Enhanced Services remains viable. We examine whether each remaining component satisfies the legal requirements for separateness and substantial affect.

Distribution of MLS Books: Freeman argues that sale of a product and sale of a delivery service are severable services for a tying claim (see *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.* (D.Mass.1979) 475 F.Supp. 973), and that because Sandicor's delivery service competes with third party delivery services like the Postal Service and UPS there exists an unlawful tying arrangement. This claim is unpersuasive. Although the complaint alleged that one component of the Enhanced Services is distribution of MLS books, the complaint did not allege that Sandicor uses an in-house delivery service that excludes third party delivery services; to the contrary, the complaint admitted outside vendors are used for delivery of MLS books.[13] Of equal

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[12] Freeman concedes on appeal that processing enrollment forms and collecting enrollment fees for subscribers, maintaining records on subscribers, billing and collecting monthly fees from subscribers and remitting them to Sandicor, and providing staff to answer questions by subscribers are integral and not separate components of the MLS.

[13] The actual provisions of the service contract between Sandicor and the local associations, which control over inconsistent allegations for purposes of demurrer (*C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1064, 211 Cal.Rptr. 765), provide that delivery charges would be "[a]s charged by delivery service."

import, Freeman affirmatively alleged that MLS books do not exist, and did not exist for more than a year before her complaint was filed. This allegation raises an insurmountable obstacle to her tying claim. A plaintiff must allege the tie affected a substantial volume of commerce in the market for the tied services. It is conceptually impossible that there is a market for a nonexistent service (here, delivery of nonexistent books) that was substantially injured by Sandicor's nonexistent distribution service.

Stocking and Distributing Sandicor Forms: Freeman argues that conditioning MLS access on Freeman's payment for Sandicor's property data profile sheets and other Sandicor forms creates an illegal tie.[14] This claim is unpersuasive. First, to the extent that Sandicor's property data profile sheets were tailored to track the format of its MLS data service, they cannot be characterized as a product separate from the MLS data service. Second, although the complaint alleged local associations stocked and distributed these forms, Freeman did not allege that she was required as a condition to MLS access to purchase or use these forms from Sandicor in lieu of using forms available from competitors.[15] Even had Freeman made that allegation, however, the complaint omitted any allegation that the availability of these forms from Sandicor caused a

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[14] She makes a similar allegation regarding Sandicor's complaint forms. However, Freeman does not allege (even in a conclusory fashion) that complaint forms are available elsewhere, making her claim defective. She cannot show that Sandicor's furnishing of complaint forms injured competitors in the complaint form market.

[15] A separate defect in Freeman's tying claim is that the complaint alleged the forms were "Sandicor property profile data forms," and although the complaint vaguely alleged that some type of forms were "available from other sources" it did not allege that Sandicor's *proprietary* forms were available elsewhere or that the tying arrangement injured competition in the "Sandicor property profile data forms" market.

substantial economic detriment to the market for forms sold by Sandicor's competitors. Freeman's complaint, insofar as it relied on the tying of forms, did not state a tying claim.

Inputting Listings: Freeman argues that tying sale of MLS access to payment for use of a local service center to input listings into the MLS database is an unlawful tying arrangement. This claim is unpersuasive. First, the complaint did not allege this service occupies a market separate from MLS access.[16] Second, because the complaint did not allege anyone competes to sell this service and instead affirmatively alleged that most agents input their own listings and do not use this service, the complaint was defective by not alleging that the tie caused substantial economic detriment to competitors who are attempting to sell this service.

Reciprocal Placement of Listings: When Sandicor has reciprocity agreements with other MLS's covering other geographic areas, Sandicor's local service centers provide two services: they process listings for San Diego County properties listed by out-of-area agents, and they process listings for out-of-area properties listed with Sandicor subscribers into the out-of area MLS. However, Freeman did not allege facts demonstrating these constitute services occupying markets separate from MLS access. Because the complaint did not allege anyone competes to sell this service and instead affirmatively alleged that no Sandicor agent ever

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[16] The court in *Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra,* 4 Cal.3d 842 at pp. 858-859, 94 Cal.Rptr. 785, 484 P.2d 953 described several factors that might suggest separateness, including whether competitors offer to sell the services separately, whether buyers are or can be charged separately for the allegedly separate services, and whether the defendant ever sells or offers to sell them separately. Freeman's complaint did not allege that any of these indicia are present regarding use of a third party to input listings into the MLS database.

uses these services, the complaint was defective by not alleging that the tie caused substantial economic detriment to competitors attempting to sell these services.[17]

Freeman's core claim is that *Palsson* and its progeny have created judicially-imposed price controls on fees for MLS access. From this premise, she argues that when a seller of a price controlled product attempts to evade the control by packaging the price controlled product with non-price controlled products, and then charges an inflated price for the package to transfer the clandestine profit from the controlled to the uncontrolled product, it is unnecessary to establish separateness or competitive injury to state a claim for a tying violation of the antitrust laws.

However, Freeman's theory relies solely on language in a dissenting opinion in *Fortner Enterprises v. U.S. Steel* (1969) 394 U.S. 495, 512-514, 89 S.Ct. 1252, 22 L.Ed.2d 495 (White, J., dissenting), which was later quoted in a footnote to the majority's opinion in *Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra,* 466 U.S. at p. 13, fn. 19, 104 S.Ct. 1551.

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[17] Indeed, Freeman's attempt to characterize the service of "processing listings for San Diego County properties held by out-of-area agents" as an unlawful tying arrangement discloses another flaw in her tying claim. Her complaint alleged that "by definition" no Sandicor subscriber would ever purchase that service because it is only provided to non-Sandicor members. This allegation is fatal to a tying claim because "when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." (*Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra,* 466 U.S. at p. 16, 104 S.Ct. 1551) Similar difficulties preclude Freeman from stating a tying claim based on the so-called illusory services (nonexistent monitoring for rules compliance; nonexistent provision of meeting space; nonexistent "other services") because Freeman did not allege Sandicor subscribers would have purchased these "nonexistent" services from other sellers in the tied-product market.

The cited language was dicta because neither case held or even considered whether tying to accomplish price-control evasion violated antitrust laws. Freeman cites no authority holding that tying designed to evade price controls, unaccompanied by the anticompetitive effects that the antitrust rules against tying are designed to prevent, violates antitrust laws.[18]

B. *The Complaint Did Not State a Price Fixing Claim*

The complaint alleged local associations engaged in unlawful price fixing for Sandicor's MLS by forming Sandicor, merging their fractionalized regional MLS's into Sandicor to create the new county-wide MLS, and charging a fixed rate for this new service. Defendants' demurrers argued the complaint did not allege an unlawful price fixing agreement because it showed (1) Sandicor unilaterally set the price for its MLS, and (2) the local associations could not conspire with Sandicor to fix prices because they were not separate entities holding separate and independent economic interests in the sale of a county-wide Sandicor MLS.

The essence of Freeman's price fixing claim is that the price charged by Sandicor for its MLS cannot be treated as a

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[18] Indeed, as Justice O'Connor noted in her concurring opinion in *Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra,* the evil that tying rules are designed to alleviate is the impact in the tied product market, not the monopoly power held in the tying product market. O'Connor points out that "[w]hether the tying product is one that consumers might wish to purchase without the tied product should be irrelevant. Once it is conceded that the seller has market power over the tying product it follows that the seller can sell the tying product on noncompetitive terms. The injury to consumers does not depend on whether the seller chooses to charge a supercompetitive price, or charges a competitive price but insists that consumers also buy a product that they do not want." (*Id.* at p. 39, fn. 8, 104 S.Ct. 1551.) Thus, the tying rules do not bar the monopolist from extracting exorbitant prices for the desired (tying) product, and a claim of price control evasion is not one remediable under antitrust tying rules.

unilateral action by the holder of a natural monopoly.[19] She argues Sandicor's separate existence must be disregarded and its pricing decision must be treated as the product of an agreement among the separate local associations.

1. Legal Framework

A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together. (*City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-Op.* (8th Cir.1988) 838 F.2d 268, 274-279 (hereafter *Mt. Pleasant*).) Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations. (*Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769-771, 104 S.Ct. 2731, 81 L.Ed.2d 628 (hereafter *Copperweld*).) A general demurrer will be sustained where the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the purpose to restrain trade. (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265-266, 195 Cal.Rptr. 211.)

Whether separate entities are present requires analysis not of the corporate formalities but of the economic realities under which the entities operate. (*Mt. Pleasant, supra,* 838 F.2d at p. 275.) The *Copperweld* court outlined the broad principles applicable to assessing whether the alleged conspirators are sufficiently separate to be capable of combining within the prohibition of the antitrust laws. *Copperweld* cautioned that the mere existence of separate incorporated entities does not automatically suffice to show that these entities are capable of combining; instead the entities must have separate and independent interests that are combined by

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[19] Unilateral actions by an entity holding a natural monopoly do not offend section 1 of the Sherman Act. (*Alaska Airlines, Inc. v. United Airlines, Inc.* (9th Cir.1991) 948 F.2d 536, 541.)

the unlawful conspiracy. Under *Copperweld*, legally distinct entities do not conspire if they "pursue[] the common interests of the whole rather than interests separate from those of the [group] itself. . . . Because [such] coordination . . . does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not activity that warrants [Sherman Act section 1] scrutiny." (*Copperweld, supra,* 467 U.S. at pp. 770-771, 104 S.Ct. 2731.)

The court in *Mt. Pleasant* applied the *Copperweld* principles in the context of separate entities that formed a joint venture [20] to provide a product that the separate entities had previously been unable to provide. In *Mt. Pleasant*, a single entity (Associated) operated an electricity-generating plant. Associated was owned and managed by six "generation and transmission" (G & T) cooperatives that purchased electricity from Associated and transported and wholesaled electricity in their respective regions. The G & T cooperatives were owned

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[20] We use the term "joint venture" in its colloquial rather than legal sense because under *Copperweld* it is the economic substance, not the legal formalities, that determine whether the entities are sufficiently separate and their combination coalesces previously separate and competing interests. (*Copperweld, supra*, 467 U.S. at p. 773, fn. 21, 104 S.Ct. at p. 2731.) For this reason, it does not matter whether local associations are treated as shareholders in an entity that is their alter ego (*Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 678, 73 Cal.Rptr. 494 [dismissing antitrust claim against corporation and its alter ego shareholders for not alleging a concert of action by persons "maintaining separate and independent interests"]), or whether Sandicor's corporate form is entirely disregarded and local associations are treated as partners in a partnership owning the county-wide MLS. Under the latter characterization, local associations as partners would be treated as agents of the partnership in connection with the partnership business (Corp. Code, § 16301) and the "agent immunity rule" deems agents incapable of conspiring with their principle. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511-512 and fn. 4, 28 Cal.Rptr.2d 475, 869 P.2d 454.)

by local electricity distribution cooperatives; these local cooperatives purchased electricity from their respective G & T cooperative and retailed it to the customers in their service area. (*Mt. Pleasant, supra,* 838 F.2d at p. 271.)

Associated also sold electricity to third parties at rates higher than it charged its members. (*Mt. Pleasant, supra,* 838 F.2d at p. 272.) A third party customer claimed the dual-price scheme was a "price squeeze" conspiracy in violation of antitrust laws. The *Mt. Pleasant* court applied the *Copperweld* principles and concluded the constituent members, although legally distinct entities, comprised a single enterprise pursuing a common goal of generating low-cost electricity that none of the members separately had previously produced or was capable of producing. The *Mt. Pleasant* court examined whether any of the G & T cooperatives pursued interests diverse from those of Associated: were any of the G & T cooperatives actual or potential competitors of Associated or hold sufficiently divergent interests. "In the language of *Copperweld*, [were there facts] show[ing] . . . the coordination between any two defendants [was] a 'joining of two independent sources of economic power previously pursuing separate interests.'" [Quoting *Copperweld, supra*, 467 U.S. at p. 771, 104 S.Ct. 2731.]" (*Mt. Pleasant, supra*, at p. 276.)

In *Mt. Pleasant*, the plaintiff claimed the G & T cooperatives had independent and conflicting economic interests because two of the G & T cooperatives disagreed with the dual rate policy, attempted to change it, and would have received economic benefits without the dual-rate policy that other G & T cooperatives would not have realized. (*Mt. Pleasant, supra,* 838 F.2d at pp. 276-277.) The *Mt. Pleasant* court rejected the argument, stating:

> "We agree with [plaintiff] that these interests were 'diverse,' but not in the sense necessary to create a fact issue on whether these companies are part of a single enterprise. It will always be true that separate com-

panies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests. This case, considering the disputes among the defendants on the issue of municipal sales, is a perfect example. Coalitions will come and go according to changing conditions and the interests of the various factions.

"But is this a sufficient basis from which to draw a reasonable inference that their coordination is a 'joining of two independent sources of economic power previously pursuing separate interests'? In this case, we think not. Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent. The disagreements we have described are more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and independent."

The principles articulated in *Copperweld* and applied in *Mt. Pleasant* have been followed by other federal courts. In *In re Appraiser Foundation Antitrust Litigation* (D.Minn.1994) 867 F.Supp. 1407, eight separate associations of appraisers created an entity ("Foundation") to set appraisal standards for the industry. Although the constituent members of the Foundation may have competed for members, and the individual members of the constituent associations may have competed with each other for appraisal business, the court rejected the conspiracy claim because the Foundation was a single enterprise whose members were interdependent (because its influence derived from representing the entire industry) and shared a common purpose of establishing standards and ethics for the entire industry. There were no facts showing any of the members pursued interests diverse from or antithetical to

the interests of the Foundation. (*Id.* at pp. 1418-1420.) In *Williams v. I.B. Fischer Nevada* (9th Cir. 1993) 999 F.2d 445, involving an antitrust suit alleging that an agreement between a franchiser and his franchisee was unlawful, the court concluded the parties could not conspire because they were part of a common enterprise. (*Id.* at p. 447.) In *F.B. Leopold Co., Inc. v. Roberts Filter Mfg. Co., Inc.* (W.D.Penn. 1995) 882 F.Supp. 433, an antitrust suit alleging that a patentee conspired with its independent sales agents, the court applied the *Copperweld* principles and concluded these parties could not conspire because the sales agents, although independent and having a diverse interest of maximizing their commissions, had economic interests and purposes so closely intertwined with the interests of the patentee that they formed a "'unified economic consciousness incapable of conspiring with itself' [quoting *Pink Supply Corp. v. Hiebert, Inc.* (8th Cir.1986) 788 F.2d 1313, 1317]." (*F.B. Leopold Co., Inc. v. Roberts Filter Mfg. Co., Inc., supra*, 882 F.Supp. 433 at p. 446.)

In contrast, when independent entities combine through an agreement that controls or restrains trade in products or services in which they previously had been actual or potential competitors, there is a "joining of two independent sources of economic power previously pursuing separate interests" (*Copperweld, supra*, 467 U.S. at p. 771, 104 S.Ct. 2731) within the antitrust proscriptions against combinations. For example, in *United States v. Topco Associates* (1972) 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515, a group of regional supermarket chains participated in a cooperative buying agency (Topco) to purchase products for resale by its constituents under the Topco label. However, the territories in which each constituent was entitled to market Topco products were restricted. (*Id.* at pp. 598-604, 92 S.Ct. 1126.) The court held this horizontal division of territory violated section 1 of the Sherman Act because the constituent sellers were actual or potential competitors in the sale of Topco products for the

territories from which some or all of them were excluded. (*Id.* at pp. 606-612, 92 S.Ct. 1126.) Similarly, in *United States v. Sealy, Inc.* (1967) 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238, a consortium of mattress and bedding manufacturers jointly owned and operated Sealy, which licensed the member-manufacturers to use its trademark but granted them territorial exclusivity for sale of Sealy trademarked products. (*Id.* at pp. 352-355, 87 S.Ct. 1847.) The court concluded the horizontal division of territory violated section 1 of the Sherman Act because the constituent manufacturers were actual or potential competitors of each other in territories from which they were excluded and the association (Sealy) was a mere instrumentality effectuating their agreement to create an unlawful horizontal restriction on competition. (*Id.* at pp. 355-358, 87 S.Ct. 1847.

2. Application

Freeman admits that Sandicor set the price for its county-wide MLS, and that unilateral action is ordinarily fatal to a claim of a price fixing conspiracy. (*Berkey Photo, Inc. v. Eastman Kodak Co.* (2d Cir.1979) 603 F.2d 263, 272, 294.) To establish the plurality of entities required for Freeman's conspiracy claim, she alleged Sandicor's separate existence should be disregarded and Sandicor's action be treated as the product of an agreement between the constituent local associations. However, the complaint alleged the constituent local associations formed Sandicor to create a new product—the county-wide MLS—and did not allege the local associations (1) acting separately had or could have provided this product in competition with each other,[21] or (2) had separate interests

[21] The complaint did allege that the local associations were competitors. This allegation does not save the complaint. First, a conclusory allegation that two entities are competitors is a legal conclusion that does not preclude a court from dismissing a complaint for not stating a claim. (*Smilecare Dental Group v. Delta Dental Plan* (9th Cir.1996) 88 F.3d 780, 785 fn. 6.) Second, and more importantly, the complaint alleged only

that were diverse from or antithetical to the interests of Sandicor in providing a county-wide MLS.

The combination of entities into Sandicor to provide a new service, like the combinations in *Mt. Pleasant* and *In re Appraiser Foundation Antitrust Litigation*, does not support conspiracy theories of antitrust liability. The combination of the local associations is a single enterprise whose members are interdependent (because its product arises only from the unified whole) and share the common purpose of creating and marketing the new product rather than a "joining of two independent sources of economic power previously pursuing separate interests." (*Copperweld, supra*, 467 U.S. at p. 771, 104 S.Ct. 2731.) Because the complaint did not allege facts that suggest the local associations pursued interests diverse from or antithetical to the interests of Sandicor, the complaint does not establish the plurality of separate entities necessary to a price fixing conspiracy claim.

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that the local associations competed for members but did not allege the local associations were actual or potential competitors in selling county-wide MLS's or could have competed on the price for those services. In an analogous context, the court in *Broadcast Music, Inc. v. CBS* (1979) 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 evaluated a claim of price-fixing filed against ASCAP, an association of copyright holders that granted blanket licenses to play the music for which its members held copyrights. The court observed that "to the extent the blanket license is a different product [from the licenses that its individual members could grant], ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license. . . . ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively. . . . [¶] Joint ventures and other cooperative arrangements are [ ] not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." (*Id.* at pp. 22-23, 99 S.Ct. 1551.) Similarly, Sandicor's members cannot have separately offered or competed to offer the same product as Sandicor.

Freeman, citing the numerous cases in which practices by real estate brokers' associations operating MLS's were held to violate antitrust laws, argues these cases were necessarily predicated on the express or implied conclusion that the constituent owners of the MLS were separate entities capable of conspiring. However, those cases are not inconsistent with our analysis because they did not involve a claim, nor did any of those courts hold, that the operators of the MLS violated antitrust laws by conspiring to fix the price of MLS's.

In the first category of cases relied on by Freeman, of which this court's decision in *NAR I* is illustrative, the antitrust violations included the MLS rule permitting only "exclusive right to sell" MLS listings and the policies and practices that facilitated price fixing of brokers' commissions.[22] (*People v. National Assn. of Realtors, supra*, 120 Cal.App.3d at pp. 477-487, 174 Cal.Rptr. 728.) Because both of these restrictions involved horizontal restraints on competition at the level the individual brokers would otherwise have freely competed with each other, the requisite coalescence of "independent sources of economic power previously pursuing separate interests" (*Copperweld, supra*, 467 U.S. at p. 771, 104 S.Ct. 2731) was present to satisfy the combination element of price fixing.

The second group of cases of which *Palsson* is illustrative[23] involved denial of access to the MLS, and

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[22] Similar concerns were present in other MLS cases relied on by Freeman. (See, e.g., *United States v. National Ass'n of Real Estate Bds.* (1950) 339 U.S. 485, 489, 70 S.Ct. 711, 94 L.Ed. 1007 [price fixing for brokers' commissions]; *United States v. Metro MLS* (E.D.Va., Sept. 20, 1973) 1974-2 Trade Cas. (CCH) 75,311 (1973 WL 918) [conspiracy to fix brokers' fees]; *United States v. Los Angeles Realty Board* (C.D.Cal., Mar. 19, 1973) 1973-1 Trade Cas. (CCH) 74,366 (1973 WL 767) [consent decree enjoining fixing of brokers' commissions].)

[23] Other cases cited by Freeman of the *Palsson* type include both state cases (such as *Glendale Bd. of Realtors v. Hounsell* (1977) 72 Cal.App.3d

evaluated MLS rules that restricted competition at the level the individual brokers competed with each other. In *Palsson*, the MLS operator held a monopoly over the relevant MLS but limited MLS access to its members. *Palsson* concluded that denying access was properly evaluated as a group boycott.[24] (*Palsson, supra,* 16 Cal.3d at pp. 931-932, 130 Cal.Rptr. 1, 549 P.2d 833.) A horizontal group boycott involves the joint efforts of competitors at the same level of distribution as the plaintiff to disadvantage that competitor by denying him the tools necessary to compete. (See, e.g., *United States v. Realty Multi-List, Inc., supra,* 629 F.2d at p. 1361.) The denial of access cases involved horizontal restraints on competition at the level individual brokers would otherwise have competed with each other, which provides the requisite coalescence of "independent sources of economic power previously pursuing separate interests" (*Copperweld, supra*, 467 U.S. at p. 771, 104 S.Ct. 2731) was present to satisfy the combination element of price fixing.

The MLS cases relied on by Freeman establish only that the requisite plurality of entities pursuing independent economic interests exists if the conduct complained of operates to restrain competition at the same level at which these actors previously had been actual or potential competitors. However, those cases have no application here because the alleged unlawful agreement—charging a set price for county-

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210, 139 Cal.Rptr. 830 and *Feldman v. Sacramento Bd. of Realtors, Inc.* (1981) 119 Cal.App.3d 739, 174 Cal.Rptr. 231) and federal cases. (See, e.g., *United States v. Realty Multi-List, Inc.* (5th Cir.1980) 629 F.2d 1351.)

[24] Although *Palsson* treated the denial of access as a group boycott it did not use the "per se" approach ordinarily applicable to horizontal group boycotts but instead evaluated the restrictions under the "rule of reason" test. (*Palsson, supra*, at pp. 931-934, 130 Cal.Rptr. 1, 549 P.2d 833.)

wide MLS's—does not restrain competition at the same level the local associations were actual or potential competitors.[25]

C. *The Complaint Did Not State A Group Boycott Claim*

Freeman's complaint alleged that she asked Sandicor to appoint her as a service center, that the local associations combined to cause Sandicor to refuse Freeman's request, and that consumers of Sandicor's services were injured because Freeman would have charged a lower price than the other local associations had she been authorized to act as a service center. The demurrers argued (1) the group boycott theory suffered from the same defect as the price fixing conspiracy theory because it did not show the local associations had economic interests separate and independent from Sandicor, and (2) Freeman's conclusory allegation that the local associations combined to cause Sandicor to refuse her request was insufficient to satisfy the requirement of alleging specific overt acts in furtherance of the conspiracy.

1. Legal Principles

The antitrust laws do not preclude a party from unilaterally determining the parties with which, or the terms on which, it will transact business. However, it is a violation of the antitrust laws for a group of competitors with separate and

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[25] The denial of access cases also are distinguishable from Freeman's price fixing claim because diverse and conflicting economic interests are present in the former group of cases and not present here. In *Palsson*, for example, the association controlled the MLS and restricted access to its members. Although the economic interest of the association's constituent members—the individual realtors—was to narrow the group of persons with access to this essential competitive tool, the association presumably had an interest in expanding its membership and had no direct stake in disadvantaging individual brokers. No similar conflicting economic interests are present with regard to the price charged by Sandicor because both Sandicor and its constituent owners share a common interest in maximizing the price and resulting profits from the service they sell.

independent economic interests, or a single competitor with sufficient leverage, to force another to boycott a competitor at the same level of distribution. (*G.H.I.I. v. MTS, Inc., supra,* 147 Cal.App.3d at pp. 266-268, 195 Cal.Rptr. 211.) In *G.H.I.I.*, the plaintiff was a record retailer that alleged three other record retailers (defendants Record Factory, Integrity, and Tower) used their market power to coerce record wholesalers to grant price discounts to defendants but not to their competitors, a so-called vertical boycott.[26] (*Id.* at

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[26] In a vertical boycott, entities at different levels of distribution combine to deny a competitor at one level the benefits enjoyed by the members of the vertical combination. For example, in *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 248 Cal.Rptr. 189, an agreement between a movie exhibitor and certain film distribution companies that allegedly excluded a competing movie exhibitor from obtaining films from the distributors was evaluated as a vertical boycott. (*Id.* at p. 703, 248 Cal.Rptr. 189; see also *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1042-1049, 219 Cal.Rptr. 203 [manufacturer's termination of distributor based on complaints from competing distributors analyzed as vertical boycott].) In contrast, horizontal boycotts involve entities at the same level combining to deny a competitor at their level the benefits enjoyed by the members of the group. (See, e.g., *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Constr. Co.* (1971) 4 Cal.3d 354, 93 Cal.Rptr. 602, 482 P.2d 226 [contractors who participated in a bid depository agree to boycott contractors who were not participants]; *Zoslaw v. MCA Distributing Corp.* (9th Cir.1982) 693 F.2d 870, 884-887.) Freeman's theory appears to assert a vertical group boycott because she alleges she was denied a benefit by Sandicor (appointment as a service center operator), even though granting her request would have been in Sandicor's best interests, because of the actions of entities (local associations) that would have competed with Freeman at the service center level. This theory appears irreconcilable with Freeman's claim that local associations do not have an identity separate from Sandicor. She alleged the refusal to appoint her as a service center benefited local associations by shielding them from competition but was contrary to Sandicor's best interests. Although the local associations' interest in excluding competing service centers may provide the plurality of entities pursuing interests separate from Sandicor for purposes of determining whether a group necessary for a group boycott exists, we

pp. 267-269, 195 Cal.Rptr. 211.) The court held that the complaint stated a claim against Tower because it alleged Tower used threats, coercion, intimidation and boycott in furtherance of its goal of forcing wholesalers to boycott plaintiff; however, the complaint did not state a claim against Record Factory or Integrity because no acts by them were alleged that furthered the coercion. (*Id.* at p. 269, 195 Cal.Rptr. 211.)

An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 119, 81 Cal.Rptr. 592, 460 P.2d 464.) California requires a "high degree of particularity" in the pleading of Cartwright Act violations (*Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 742, 162 Cal.Rptr. 543), and therefore generalized allegations of antitrust violations are usually insufficient.[27] (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra,* 69 Cal.2d at pp. 317, 326-328, 70 Cal.Rptr. 849, 444 P.2d 481.) The unlawful combination or conspiracy must be alleged with specificity. The *Chicago Title* court noted that "'contracts, combinations or conspiracies in restraint of . . . trade or commerce cannot be alleged generally in the words of the statute but . . . facts must be set forth which indicate the existence of such contracts, combinations or conspiracies.'" (*Id.* at pp. 316-317, 70 Cal.Rptr. 849, 444 P.2d 481.) Therefore, general allegations of a conspiracy unaccompanied by factual allegations of overt acts in furtherance of conspiracy are insufficient to state a group boycott antitrust claim. (*Id.* at pp. 317-318, 70

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perceive Freeman's group boycott claim necessarily disavows any reliance on her alter ego allegations.

[27] The federal courts also recognize that conspiracy is the gravamen of the complaint (*Dahl, Inc. v. Roy Cooper Co.* (9th Cir.1971) 448 F.2d 17, 19) and must be pleaded in more than conclusory terms. (*Gilbuilt Homes, Inc. v. Continental Homes, etc.* (1st Cir.1981) 667 F.2d 209, 210.)

Cal.Rptr. 849, 444 P.2d 481; *Bartley v. California Association of Realtors* (1980) 115 Cal.App.3d 930, 935, 173 Cal.Rptr. 284.) The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient. (*Jones v. H.F. Ahmanson & Co., supra*, 1 Cal.3d at p. 119, 81 Cal.Rptr. 592, 460 P.2d 464.)

2. Application

Freeman alleged the refusal to allow her to become a service center was conceived and initiated by the local associations, which would have been competitors of Freeman's in operating a service center, and the local associations used their "market power and position to cause Sandicor to refuse" to appoint Freeman as a service center. Freeman's conclusory statement that the local associations caused Sandicor to refuse Freeman's request is insufficient to satisfy the requirement of alleging specific overt acts in furtherance of a conspiracy to boycott Freeman. The complaint contained no allegation of specific acts, threats, coercion, intimidation or other unlawful conduct employed by local associations to force Sandicor to boycott Freeman.[28]

Freeman argues that the facts alleged in her group boycott claim were adequate because a refusal to deal resulting from coercive pressure satisfies the combination requirement. Therefore, she concludes, the local associations' coercion of Sandicor to refuse her request sufficed for this cause of

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[28] Indeed, Freeman's claim appears to suffer from the same deficiency as did the plaintiff's claim against Record Factory and Integrity in *G.H.I.I.* Here, Freeman alleged only that local associations somehow used their "market power and position" to cause Sandicor to "boycott" Freeman; similarly, the plaintiff's boycott allegations against Record Factory and Integrity alleged they "employed economic leverage" to obtain the benefits denied to plaintiff, which the court found insufficient absent allegations of coercion or other unlawful conduct. (*G.H.I.I., supra*, 147 Cal.App.3d at p. 269, 195 Cal.Rptr. 211.)

action. However, Freeman did not allege (even in conclusory terms) that the local associations coerced Sandicor into refusing her request, or any specific acts by local associations that constituted the coercion. Because Freeman was given leave to amend her complaint but elected to stand on the allegations as pleaded, we construe any ambiguity against Freeman (*Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 48, 280 Cal.Rptr. 876) and conclude that her "'failure to make a good pleading probably arises in a lack of facts rather than in the fault of the pleader.' [Quoting *Dukes v. Kellogg* (1900) 127 Cal. 563, 565, 60 P. 44.]" (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra*, 69 Cal.2d at p. 328, 70 Cal.Rptr. 849, 444 P.2d 841.)

We reject Freeman's argument that the denial of access cases demonstrate she has stated a valid group boycott claim. Denying her request to become a service center is fundamentally different from excluding her access to the MLS. The denial of access cases have recognized that exclusion from an MLS only superficially resembles other forms of group boycotts.[29] (*Palsson, supra*, 16 Cal.3d at pp. 930-934, 130 Cal.Rptr. 1, 549 P.2d 833.) *Palsson* held the MLS operator's freedom to exclude non-members was limited because the MLS provided an irreplaceable tool for realtors and the anti-competitive impact of excluding them from MLS access far outweighed any justifications for exclusivity. *Palsson* explained at page 938, 130 Cal.Rptr. 1, 549 P.2d 833 that the

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[29] The federal denial of access cases have similarly recognized that although denial of access to an MLS bore some resemblance to classic group boycott arrangements, such "'easy labels do not always supply ready answers'" (*United States v. Realty Multi-List, Inc., supra*, 629 F.2d at p. 1365) and have rejected the per se illegality test ordinarily applicable to classic group boycotts in favor of a rule of reason analysis when examining denial of access to MLS's. (*Id.* at pp. 1366-1369.) These observations convince us that the denial of access cases have no application to whether the conduct complained of in this case—denial of Freeman's request to become a service center—can be actionable as a group boycott.

right of an MLS operator to select its subscribers was not absolute because:

> "While the Marin County Board of Realtors may permissibly provide some exclusive benefits to its members, access to the multiple listing service is so essential to nonmembers if they are to compete effectively that such access must be granted to all licensed salesmen and brokers who choose to use the service."

However, we perceive no similar reason here to limit the ordinary rule that a producer may choose its own distributors. (*Albrecht v. Herald Co.* (1968) 390 U.S. 145, 150, 88 S.Ct. 869, 19 L.Ed.2d 998, overruled on other grounds by *State Oil Co. v. Khan* (1997) 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199.) Freeman's complaint did not allege that acting as a service center is so essential to her business that she cannot compete as a real estate agent unless she is appointed as a service center. In *Palsson*, the court examined whether the association could limit admission to only those agents who were primarily engaged in the business of selling real estate. *Palsson* observed at page 938, 130 Cal.Rptr. 1, 549 P.2d 833 that:

> "The 'primarily engaged' rule is sometimes justified on the grounds that the board has the right to choose its own members. It has never been the law in California that a voluntary association may be forced to open its membership rolls to all who apply. On the other hand, when membership in an association is a practical economic necessity, judicial review is available to examine bases for exclusion from membership. [Citations.] In the case at bar, . . . membership in the Marin County Board of Realtors must be termed a practical economic necessity for real estate salesmen. As noted above, without membership in the board, a salesman is denied employment with 75 percent of the residential real estate brokers in the county and a subsequent reasonable

> opportunity to earn a livelihood in real estate. The economic benefits of membership mandate that exclusion be subject to judicial review." (Fn.omitted.)

Palsson's rationale demonstrates the inapplicability of the denial of access cases to Freeman's group boycott claim. These cases do not stand for the proposition that Sandicor must appoint as service centers all who apply or confront antitrust liability under a group boycott theory. Unlike the denial of access cases, there is no similar practical economic necessity that Freeman act as a service center. Because Freeman cites no pertinent authority that an antitrust group boycott claim arises whenever a producer refuses to grant a new franchise to an applicant, we conclude Freeman's group boycott claim was properly rejected.

D. *Excessive Prices Do Not Violate Antitrust Laws*

Freeman's final antitrust claim contends that because Sandicor's monthly fee for access to the MLS is more than some brokers can afford, Sandicor has violated the antitrust laws by pricing these brokers out of the market and thereby unreasonably restrained trade by limiting the pool of competing brokers.[30]

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[30] Although we reach this claim, we have substantial doubt Freeman has standing to assert this claim. Freeman admits she is not one of the brokers excluded from the market based on inability to pay. Therefore the antitrust injury alleged—exclusion from the broker market—is not an injury she has suffered. (*Cal. Computer Products v. Internat. Business Machines* (9th Cir.1979) 613 F.2d 727, 732 [antitrust standing conferred only on those injured by the antitrust violation].) Indeed, because Freeman alleged she has remained active in selling real estate, she has benefited to the extent that higher prices have reduced the pool of her competitors, thereby undercutting her standing on this claim. (*Atlantic Richfield Co. v. USA Petroleum Co.* (1990) 495 U.S. 328, 336-337, 110 S.Ct. 1884, 109 L.Ed.2d 333 [plaintiff lacked standing because it was benefited rather than harmed by the antitrust violation].)

Freeman's contention is based on the *Palsson* language that an MLS may not exclude nonmembers from its service but may charge nonmembers "a reasonable fee for use of the service consistent with the per-capita costs of operation." [31] (*Palsson, supra*, 16 Cal.3d at p. 940, 130 Cal.Rptr. 1, 549 P.2d 833.) Although the courts have recognized this language was dicta (see *Feldman v. Sacramento Board of Realtors, supra,* 119 Cal.App.3d at p. 747, 174 Cal.Rptr. 231), Freeman argues *Palsson* and its progeny have imposed judicial price controls on the fees that an MLS may charge. From this premise, Freeman argues she has pleaded a claim for antitrust violations by alleging that the amounts charged by Sandicor are unreasonable and operate to restrain competition.

We evaluate Freeman's argument by first defining what is not at issue. First, Freeman's excessive price argument must be evaluated as asserting an antitrust violation based on the unilateral pricing decisions of Sandicor for its county-wide MLS; we have already rejected her claim of a price fixing combination among competitors that resulted in excessive prices. Second, Freeman's excessive price argument does not assert discriminatory pricing, but instead admits that all users are charged the same price. Finally, Freeman's excessive price argument does not suggest Sandicor cannot charge some amount for its service, but only alleges that the price actually charged is unreasonable because it is excessive.

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[31] The federal courts that have found MLS access limitations invalid and mandated they be made available to qualifying realtors have similarly approved charging a fee "representing, for example, the actual cost of starting up his service and a *pro rata* contribution toward the costs of the maintenance and development of [the MLS], including the accumulation of reasonable reserves." (*United States v. Realty Multi-List, Inc., supra,* 629 F.2d at p. 1387.)

The law is clear that unilateral pricing decisions do not violate section 1 of the Sherman Act.[32] (*Alaska Airlines, Inc. v. United Airlines, Inc., supra,* 948 F.2d 536, 541 [unilateral price charged for access to computerized reservations systems (CRS) does not offend section 1's ban on combinations; pricing evaluated under Sherman Act section 2 monopolization provisions].) Furthermore, section 2 of the Sherman Act is not violated merely because the holder of a monopoly charges high prices. The *Alaska Airlines* court, rejecting an antitrust claim that alleged an operator of a CRS was extracting excessive prices for access to its service, observed:

> "The Sherman Act also has not been interpreted to penalize natural monopolies. A firm that creates a valued service or product should not be punished with treble damages and criminal sanctions merely because the firm finds itself to be the holder of a natural monopoly. [Citation.] Government regulation, as opposed to treble damages and criminal liability under the Sherman Act, is generally thought to be the appropriate remedy for the difficulties posed by natural monopolies. [Citation.] '[J]udicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us.' [(Quoting *Berkey Photo v. Eastman Kodak Company* (2d Cir. 1979) 603 F.2d 263, 294.)]
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> "....

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[32] This alone would appear to doom Freeman's Cartwright Act claim. The Cartwright Act bans combinations but does not have any parallel to Sherman Act section 2's anti-monopoly provisions. (*State of California ex rel. Van de Kamp v. Texaco Inc., supra,* 46 Cal.3d at pp. 1152-1169, 252 Cal.Rptr. 221, 762 P.2d 385.) However, even if some form of Sherman Act section 2 is included in the Cartwright Act, we nevertheless conclude Sandicor's price decisions are not actionable under the Cartwright Act.

> "[S]etting high prices in the original 'monopoly' market [] represent[s] the cost that we incur when we permit efficient and natural monopolies. See *Berkey Photo*, 603 F.2d at [p.] 294 ('setting a high price may be a use of monopoly power, but it is not in itself anticompetitive'). The Supreme Court has consistently held that there must be 'predatory' conduct to attain or perpetuate a monopoly for a monopolist to be liable under Section 2. [Citations.]" (Fns.omitted.)

These observations of the *Alaska Airlines* court convince us that unilateral action by a monopoly holder in charging allegedly excessive prices, standing alone, does not ordinarily violate antitrust laws even though high prices may have some ancillary effect on the ability of consumers of those products to compete. We therefore examine whether the California courts have carved an exception to ordinary antitrust laws, unique to MLS charges, that impose price controls on MLS's under the Cartwright Act.

We do not interpret *Palsson* and its progeny as construing the Cartwright Act to permit judicial oversight of unilateral price decisions. The focus of *Palsson* was not the price charged for MLS access, but whether two specific practices—denial of MLS access to nonmembers and denial of membership to part-time realtors—were unreasonable combinations in restraint of trade. (*Palsson, supra,* 16 Cal.3d at pp. 934-940, 130 Cal.Rptr. 1, 549 P.2d 833.) *Palsson* concluded these rules did restrain trade, did not satisfy the rule of reason requirements, and accordingly ordered these rules be eliminated. (*Id.* at p. 940, 130 Cal.Rptr. 1, 549 P.2d 833.) Although *Palsson* stated "nonmembers may be charged a reasonable fee for use of the service consistent with the per-capita costs of operation" (*ibid.*), this comment was dicta and not part of its antitrust analysis.[33]

---

[33] A second case evaluating MLS practices, *Glendale Bd. of Realtors v. Hounsell, supra,* 72 Cal.App.3d 210, 139 Cal.Rptr. 830, merely applied

The courts in *NAR I*, *NAR II* and *Palsson* did not evaluate whether the price charged by an MLS violated antitrust laws. Those cases evaluated whether denial of MLS access to nonmembers was an unlawful group boycott, whether permitting only exclusive rights to sell MLS listings was an unlawful restraint on trade and whether certain policies and practices facilitated price fixing for brokers' commissions. Although this court held that SDAR was required to grant access to the MLS and enjoined SDAR from imposing any cost for use of such service beyond the cost of providing the service itself, this aspect was part of the remedy and not part of the antitrust analysis.

Feldman v. Sacramento Bd. of Realtors, Inc., supra, 119 Cal.App.3d 739, 174 Cal.Rptr. 231 is the only California case of which we are aware that directly evaluates an antitrust claim based solely on the allegation the price charged for MLS's was excessive. In *Feldman*, a realtor sought to use several MLS's without paying the initiation or participation fees charged for those services. The realtor argued he should be entitled to purchase each MLS book whenever he had occasion to use it. In his lawsuit asserting denial of the right to purchase individual books violated the Cartwright Act, the trial court granted summary judgment in favor of the MLS's based on their showing that the initiation and participation fees that they charged were non-discriminatory and based on the costs associated with operating the MLS. (*Id.* at pp. 742-743, 174 Cal.Rptr. 231.) *Feldman* reversed the trial court, reasoning that because any practice that might restrain competition must be assessed under a "rule of reason" analysis (*id.* at p. 745, 174 Cal.Rptr. 231), the fact that the fees charged were consistent with defraying the costs incurred in operating the MLS overhead would not preclude a trier

---

Palsson and held that denial of access to nonmembers, regardless of membership criteria, violated the rule of reason. (*Id.* at pp. 212-213, 139 Cal.Rptr. 830.)

of fact from nevertheless determining the fees were "unreasonably restrictive of competition." (*Id.* at pp. 746-747, 174 Cal.Rptr. 231.) *Feldman* then evaluated whether the plaintiff's antitrust claim satisfied what the court perceived to be the applicable pleading requirements for a rule of reason violation. Relying on *Tampa Electric Co. v. Nashville Coal Co.* (1961) 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 and *Magnus Petroleum Co., Inc. v. Skelly Oil Co.* (7th Cir. 1979) 599 F.2d 196, 201-202, *Feldman* held the plaintiff must allege the defendant held monopolistic powers and engaged in practices that seriously hampered the competitive market to which the plaintiff belonged, and ultimately concluded the pleading was deficient. (*Feldman v. Sacramento Bd. of Realtors, Inc., supra,* 119 Cal.App.3d at pp. 747-748, 174 Cal.Rptr. 231)

We are convinced *Feldman's* conclusion that a plaintiff states an antitrust claim under the Cartwright Act based solely on the allegation that a monopolist's excessive price for its product unreasonably restrains trade was erroneous and should not be perpetuated. First, *Feldman* was decided before *State of California ex rel. Van de Kamp v. Texaco Inc., supra,* 46 Cal.3d 1147, 252 Cal.Rptr. 221, 762 P.2d 385, decided that the Cartwright Act bans combinations but does not have any provisions parallel to Sherman Act section 2's anti-monopoly provisions. Therefore *Feldman* gave no guidance on whether a monopolist's unilateral practices offend the Cartwright Act. Second, as explained by the *Alaska Airlines* court, setting a high price may be a use of monopoly power but is not in itself anti-competitive; there must be predatory conduct to attain or perpetuate a monopoly before a monopolist can be assessed treble damages under a Sherman Act section 2 claim. Third, the cases relied on by *Feldman* for its holding, *Tampa Electric Co. v. Nashville Coal Co., supra*, and *Magnus Petroleum Co., Inc. v. Skelly Oil Co., supra*, do

not support the proposition that Sherman Act liability arises merely because a monopolist's excessive price unreasonably restrains trade.[34]

The proposition in *Feldman* on which Freeman relies has never been cited by any subsequent court and is inconsistent with federal authorities construing the Sherman Act. We therefore decline to follow *Feldman's* conclusion that a monopolist's allegedly excessive price, without more, gives rise to antitrust liability merely because the plaintiff alleges that price unreasonably restrains trade.[35]

---

[34] The focus of the *Tampa Electric* and *Magnus Petroleum* courts was whether the contracts there violated the broader provisions of section 3 of the Clayton Act (15 U.S.C. § 14), which proscribes "exclusive dealings" contracts by which a seller agrees to sell or lease goods on condition that the purchaser not buy goods from the seller's competitors if those contracts substantially lessen competition or tend to create a monopoly in any line of commerce. The *Tampa Electric* court concluded that because the contract did not violate the Clayton Act it was unnecessary to reach any Sherman Act claims. (365 U.S. at p. 335, 81 S.Ct. 632.) The *Magnus Petroleum* court found no Clayton Act violation on the exclusive dealings aspect of the claim (599 F.2d at pp. 200-204) and then concluded that the subsidiary argument, which effectively alleged a tying between the agreement to provide the plaintiff financing and its agreement to purchase goods, was mooted by its determination that there was no substantial adverse effect on competition. (*Id.* at p. 204.) Neither case supports *Feldman's* conclusion that an antitrust claim arises merely because a monopolist's excessive price unreasonably restrains trade.

[35] To hold otherwise would place this court in the role of a price control board. In an analogous context, the court in *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 27 Cal.Rptr.2d 396 was asked to use the statutory law of unfair competition (Bus. & Prof. Code, § 17200 et seq.) to determine that a fee charged by a bank was so excessive it was invalid for unconscionability. Rejecting this claim, the court observed at page 218, 27 Cal.Rptr. 2d 396 that "[j]udicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees. . . . '[T]he control of charges, if it be desirable, is better accomplished by statute or by regulation authorized by statute than by *ad hoc* decisions of the courts. Legislative committees and

IV.

FREEMAN'S CLAIM FOR VIOLATION OF THE INJUNCTION

Freeman asserts she stated a valid damage claim against SDAR for violation of the 1984 injunction. She argues the injunction entered after remand in *NAR II* limited SDAR's fees for MLS access to a "reasonable" charge and SDAR violated that injunction by charging $100 per month when the reasonable charge for MLS access was $25 per month. Neither Freeman nor Sandicor was a party in either *NAR I* or *NAR II*.

Defendants dispute whether Freeman has standing to prosecute a claim for an alleged violation of an injunction issued in an action to which she was not a party.[36] The defendants also dispute whether the substance of the injunction was intended to impose price controls or only assure equal access to SDAR's MLS. It is unnecessary to reach these issues because we conclude the complaint on its face shows that the party enjoined, SDAR, is not the party whose actions Freeman alleged violate the injunction.

---

an administrative officer charged with regulating an industry have better sources of gathering information and assessing its value than do courts in isolated cases.' [(Quoting *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.* (1971) 22 Cal.App.3d 303, 311, 99 Cal.Rptr. 417.)] [¶] This case implicates a question of economic policy: whether service fees charged by banks are too high and should be regulated. 'It is primarily a legislative and not a judicial function to determine economic policy.' [(Quoting *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 455-456, 55 P.2d 177.)]

[36] Freeman cites no authority that she has standing. Indeed, Freeman cites no authority holding a private civil action seeking damages for violation of an injunction may be maintained, although some courts have stated in dicta that such an action is available. (See, *H.J. Heinz Co. v. Superior Court* (1954) 42 Cal.2d 164, 175, 266 P.2d 5.)

Freeman alleged Sandicor was the party selling the county-wide MLS and unilaterally setting and collecting the allegedly excessive fees for that service. However, the complaint did not allege Sandicor is restrained by the injunction against SDAR; to the contrary, the complaint alleged that only SDAR violated the injunction. An action claiming violation of an injunction must plead and prove the party was bound by the order and had the ability to comply with the order. (*Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736-1737, 39 Cal.Rptr.2d 906.) Assuming arguendo the injunction was intended to place an upper limit on fees that could be charged for MLS's,[37] the complaint did not allege the party that set the fees (Sandicor) was bound by the injunction, or that the party that was bound by the injunction (SDAR) had the ability to comply with the injunction by charging fees at levels below those set by Sandicor.

---

[37] Although we conclude it is unnecessary to evaluate the merits of Freeman's price control claim, our judgment would remain unchanged even were we to reach this issue. The purpose of the language permitting "reasonable fees [to] be charged for all services" in the injunction, which we would construe de novo as a matter of law (*Lane v. Lane* (1953) 117 Cal.App.2d 247, 251, 255 P.2d 110), has been mooted by changed circumstances. The injunction was issued under circumstances in which SDAR members and nonmembers were treated differently: members had access to SDAR's MLS (apparently without any fees beyond those paid for association membership) and nonmembers had no access. The principal holding of *Palsson, NAR I and NAR II* was that the benefits of the MLS must be equally available to members and nonmembers; the fees authorized by the injunction were to assure the burdens accompanying the benefits of the MLS be fairly shared by members and nonmembers. However, the access/fee structure under the Sandicor MLS has mooted any concerns over differential benefits and burdens; all realtors have the same access and costs of access regardless of their affiliations with any local association. Because the intent of the reasonable fees sentence of the injunction operated in an environment that is no longer present, that aspect of the injunction appears to have no further purpose.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

BENKE, Acting P. J., and HUFFMAN, J., concur.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56231
D.C. No. CV-98-00139-MJL

ARLEEN FREEMAN, individually and on behalf of all others similarly situated; JAMES ALEXANDER, individually and on behalf of all others similarly situated; EDWARD Y. URATA, individually and on behalf of all other similarly situated,

Plaintiffs-Appellees,

v.

SAN DIEGO ASSOCIATION OF REALTORS; NORTH SAN DIEGO COUNTY ASSOCIATION OF REALTORS; PACIFIC SOUTHWEST ASSOCIATION OF REALTORS, INC.; EAST SAN DIEGO COUNTY ASSOCIATION OF REALTORS; CORONADO ASSOCIATION OF REALTORS; SANDICOR, INC.; ANITA ALKIRE; CALIFORNIA ASSOCIATION OF REALTORS,

Defendants-Appellants,

and

MICHAEL SPILGER; GREG BRITTON; JOEL FORREL; GWEN HOVLAND; AILEEN OYA; MARTY CONRAD; LAUREN REISER; PHYLLIS GRITTS; CHRIS H. LEWIS; LOU ANN WILLIAMS; CORY SHEPARD; SARA BROWN; JOYCE V. AMICK; JERRY SCANTLIN; WALTER BACZKOWSKI; MARK MARCHAND; STEPHEN GAMES,

Defendants.

April 24, 2003

ORDER

The opinion filed March 10, 2003, is amended. The last sentence in the first full paragraph on page 3589 is amended to read as follows:

> Similarly, *Williams* v. *I.B. Fischer Nevada*, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993) (per curiam), found that a fast food franchisor and its franchisees were a single entity; among other things, the franchisees were located too far apart to be effective competitors, even though they could vary their prices. *See id.* at 1031-32.

The last sentence on page 3590 is amended to read as follows:

> Cases have required instead that the constituent entities be neither actual nor *potential* competitors. *City of Mt. Pleasant*, 838 F.2d at 276; *cf. Williams*, 794 F. Supp. at 1031-32.

With these amendments, the petition for rehearing and rehearing en banc is DENIED. Fed R. App. P. 35, 40.

APPENDIX E

SERVICE AGREEMENT

This agreement entered into this 18th day of December, 1991 by and between SANDICOR inc (hereinafter "SANDICOR") and the Coronado Association of REALTORS (hereinafter "the Association") is made with reference to the following facts:

A. SANDICOR is a corporation organized under the laws of California whose principal office is located at 201 Lomas Santa Fe Drive, Suite 330, Solana Beach, California, 92075.

B. SANDICOR operates a regional multiple listing service which serves the entire San Diego county as defined by the NATIONAL ASSOCIATION OF REALTORS.

C. The Association is a mutual benefit corporation organized under the laws of California whose principal office is located at 1000 Orange Avenue, Coronado, California 92118.

D. SANDICOR wishes to establish a local SANDICOR Service Center to service SANDOCOR's MLS participants and the Association wishes to operate such a center as an independent contractor of SANDICOR.

WHEREFORE, THE PARTIES agree as follows:

1. The Association will provide the following services to SANDICOR MLS participants:

   a. Enroll SANDICOR MLS participants by processing SANDICOR MLS participant applications and collecting appropriate SANDICOR fees for MLS participation on such forms as required by SANDICOR;

   b. Bill SANDICOR MLS participants enrolled at the Association, collect SANDICOR MLS fees and remit them to SANDICOR as set forth herein or in accordance with the procedures set forth later by SANDICOR;

c. Input listings into the SANDICOR computer data base as requested by SANDICOR MLS participants enrolled by the Association;

d. Monitor listings for properties within the Association's jurisdiction for compliance with the SANDICOR rules whether or not submitted by a SANDICOR Participant enrolled by the Association;

e. Provide forms for SANDICOR MLS rules complaints and forward any complaints to SANDICOR for processing;

f. Distribute SANDICOR MLS Books to SANDICOR MLS Participants enrolled through the Association. If the number of orders for the local area book fails;

g. Stock and distribute SANDICOR property data profile sheets and other SANDICOR forms and supplies;

h. Maintain records on SANDICOR participants enrolled by the Association;

i. Provide meeting facilities on premises at the Association offices as requested by SANDICOR.

j. Provide staff to answer questions of SANDICOR MLS participants enrolled by the Association;

k. Process reciprocal listings on properties within the Association's jurisdiction, and on properties outside SANDICOR's jurisdiction, from Multiple Listing Services that have a reciprocal agreement with SANDICOR;

l. Process reciprocal listings on properties outside SANDICOR's jurisdiction submitted by SANDICOR MLS participants enrolled by the Association and submit them to the appropriate Multiple Listing Services that have a reciprocal agreement with SANDICOR, and

m. Such other duties as may be agreed upon by SANDICOR and the Association.

2. In consideration of the above services, SANDICOR will pay to the Association the fees itemized on Schedule A. As additional consideration, SANDICOR will provide for a fee the services listed in Schedule B to the members of the Association.

SANDICOR shall not be obligated to pay the fees set forth in Exhibit A for those Association's MLS Participants assigned to SANDICOR until December 31, 1991 for which the Association MLS Participant had paid fees to the Association and SANDICOR implements its fee schedule with respect to those participants.

3. The Association will enroll as a SANDICOR participant any individual who is eligible to participate in the SANDICOR MLS under SANDICOR's Rules and who wishes to enroll at the undersigned Association. The Association will have no authority to enroll SANDICOR MLS participants that are not eligible for such participation or access under SANDICOR's governing documents.

4. The Association will provide SANDICOR with a roster of participants it has enrolled and notify SANDICOR by the 10th if the following month of any changes to the list of enrolled participants.

5. The Association shall deposit SANDICOR fees it collects into an authorized SANDICOR account. The Association shall send a statement to SANDOCIR on a SANDICOR approved form itemizing each deposit on the same day of the deposit by a procedure specified by SANDICOR. SANDICOR shall pay the Association the amounts due pursuant to Schedule A on the fifteenth (15th) of each month for services rendered on or before the last day of the previous month.

6. The term of this agreement shall be one year. Unless sixty days notice of termination is given by either party, this agreement shall be automatically renewed annually upon its anniversary date for another term of one year. SANDICOR shall have the right to terminate this agreement with five (5) days notice if the Association gives unauthorized access to SANDICOR or if the Association breaches its obligations under this contract. This contract shall automatically terminate if the Association ceases to be a shareholder of SANDICOR.

7. Duplicate originals of this agreement nay be executed simultaneously with the original of the same, and if so executed by all parties hereto, said duplicate originals shall have the same force and effect and evidentiary value as the original of this agreement.

8. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and, the judgment upon the award rendered by the Arbitrator(s) may be entered in any Court with jurisdiction thereof.

9. In any action, proceeding or arbitration arising out of this contract, the prevailing party shall be entitled to reasonable attorney's fees and costs.

Coronado Association of REALTORS

By: Malcolm Jolley
MALCOLM JOLLEY
1991, President

SANDICR inc

By: Manley Bland
MANLEY BLAND, President

SCHEDULE A Amendment

(Adopted by the SANDICOR Board of Directors
September 16, 1992)

Servicing fees paid by SANDICOR to Boards/Associations of REALTORS:

1. Subscription Fees:

   On going monthly subscription fees for each SANDICOR MLS participant or subscriber enrolled by the Association.

   $25.50 per month

2. Enrollment Fees:

   A one-time enrollment fee for each new SANDICOR MLS participant enrolled by the Association (does not apply to accounts initially transferred to SANDICOR).

   $250 per participant

   There will be a transfer fee or reinstatement fee any time a participant transfers his participation from one SANDICOR Service Center to another or is reinstated to participation.

   $50 per change

   A one-time set up fee for each new subscriber affiliated with a SANDICOR MLS participant enrolled by the Association (does not apply to accounts initially transferred to SANDICOR).

   $25 per person

   There will be a transfer fee or reinstatement fee any time a subscriber transfers his participation from one SANDICOR Service Center to another or is reinstated to participation.

   $25 per change

3. Insertion Fees:

   Broker loaded listings and back on market listings.

   $0 per listing

   Service Center loaded listings and back on market listings.

   $15 per listing

4. Status Changes:

   Service Center made status changes (applies only when listing was broker loaded initially).

   $5 per status change

5. Supplemental Remarks:

Broker loaded	$10 per first supplement per listing $15 for the second supplement $20 for the third supplement $25 for the fourth supplement $30 for the fifth supplement
Service Center loaded	$20 per first supplement per listing $25 for the second supplement $30 for the third supplement $35 for the fourth supplement $40 for the fifth supplement

6. Reciprocal Listing Fees:

   A fee equal to the reciprocal processing fee agreed to between SANDICOR and any other Multiple Listing Service.

7. Copies of Listings and Photos:

Extra copies of listings	$7 per 100 copies *
4x6 color photographs	$5 handling fee plus cost of photos
Maps and Additional Photos	$1.00 *
Delivery fee	As charged by delivery service

SCHEDULE B

MIS-Mortgage Information Service
MAIL-Agent Mail
AST-Area Statistics
PR-Prospecting
SL-Search Listings
ES-Easy Search Listings
TAX-Tax Database
All Financial Functions
CF-Custom Formatting
RP-Reverse Prospecting
OA-Office Active Listings
SSS-Super Search Listings

* Includes vendor charge

Supreme Court, U.S.
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No. 03-300

(2)

In The

Supreme Court of the United States

SAN DIEGO ASSN. OF REALTORS, ET AL.,

Petitioners,

v.

ARLEEN FREEMAN and JAMES ALEXANDER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Aug. 28, 2003

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QUESTION PRESENTED

Whether, as the Ninth Circuit held, an agreement between joint venturers to set a price for services that are concededly necessary to support their new, pro-competitive product may nevertheless be condemned, under Section 1 of the Sherman Act, as unlawful per se?

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OPINIONS BELOW

The opinion of the court of appeals, as amended, was published on April 24, 2003 at *Freeman v. San Diego Assn. of Realtors*, 322 F.3d 1133 (9th Cir. 2003). The unamended opinion is found at Pet. App. 1a-35a, with the amendment at Pet. App. 121a-122a. The district court issued an unpublished opinion, reproduced at Pet. App. 36a-78a.

JURISDICTION

Petitioners report they filed their petition for a writ of certiorari on August 22, 2003, within the extended time permitted by Justice O'Connor. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION

Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

1. Sandicor History and Pre-History

In 1991 there were eleven associations of realtors in San Diego County. Seven in the north operated a single joint venture MLS called the North MLS. The costs for the central computer, software, modems, and staff – the *system* costs – were computed and charged equally to all users of the North MLS. A computer database of homes for sale does not make an MLS: it requires someone to induct new users, teach them how to use the system, and bill them periodically. Therefore, each of the seven north associations provided staff to perform those *support* functions at each association office. Each of the seven north associations independently set its own support prices based on its independently-set support level, staff salaries, overhead costs, and so on. The total price paid by a user of any given north association was the sum of the *system* cost (same for all users) plus *support* cost (which varied for all seven north associations). Thus, the total user cost of the MLS was different at each association. The seven north associations were actual competitors because users had a choice which of the seven associations they bought MLS services from. Services and prices varied between the seven associations, but their homes-for-sale data was identical. The North MLS was legal in every respect.

Three associations in the southern part of San Diego operated a joint venture MLS called the South MLS. It operated in the same manner as the North MLS. The three associations set their support prices independently, resulting in three separate prices for the identical homes-for-sale data in the southern part of San Diego County.

The Coronado association operated its own MLS of data focusing on the expensive homes in the Coronado area of San Diego County. Whereas the North and South MLSs were regional MLSs – involving the joint efforts of several realtor associations – Coronado was not.

Prior to Sandicor's formation, San Diego, the largest association with half the realty agents in the county, charged a support price of $10 per user per month. A weighted average of all eleven associations' pre-Sandicor support prices was about $18[1] per user per month.

Sandicor was the result of the merger of the North, South, and Coronado MLSs.[2] It started operations Jan. 1, 1992, with the data from those three MLSs. Each association continued to provide support services to MLS users: induction, training, and billing. Users made payments with a single check to Sandicor; the price was the sum of Sandicor's system costs per user plus the support price set by the associations.

The price-fixing agreement at the core of this case came about at a meeting on June 17, 1991, just prior to the roll-out of Sandicor. C.A. ER 163-188. The impetus for the price-fixing scheme was the complaining of two financial weaklings from the North MLS: the Fallbrook and Valley Center associations. Their pre-Sandicor support prices were

---

[1] The support prices and MLS users in each association are found at C.A. ER 163. The weighted average is found by multiplying the number of users in each association by the support price of that association, by adding those products, and by dividing the sum by the total number of users, 14,267.

[2] Sandicor was technically not a county-wide MLS, since it intentionally excluded the small REBA MLS in the La Jolla area.

nearly $50 per agent per month. Valley Center and Fallbrook protested that if each association continued to set its own prices independently, their users would flock to much lower-priced rivals (i.e., the San Diego association to the south) once Sandicor commenced operations, and they would go out of business. Alkire Declaration, ¶ 34, C.A. ER 968-969. The delegates for the eleven associations decided to fix prices at $25 per MLS user per month, with some of the surplus funds (received as a result of the supra-competitive prices) paid monthly to Fallbrook and Valley Center as a subsidy.

At the June 17, 1991 meeting, the San Diego representatives were unhappy about the price-fixing agreement. They knew their 7,100 users would be overcharged under the proposed price-fixing scheme: 7,100 San Diego users times $15 price-fixed overcharges per month times 12 months per year > $1 million per year in overcharges. However, they accepted the price-fixing agreement because the negotiators all agreed that the price-fixing and subsidies would only last two years. Tyson Declar. C.A. ER 177-178. However, two years later, the prices remained fixed at a high level and the subsidies continued. In early 1994, the San Diego association exploded in anger, writing a letter demanding an end to price-fixing. C.A. ER 320-322. Three months of stormy negotiations and threats followed, and San Diego decided to live with the price-fixing scheme. C.A. ER 343.

Petitioners' first major error is their failure to distinguish between *system* prices (Sandicor's staff, computer, software, overhead costs) and *support* prices (the prices of support of the associations for induction, training, billing), and their implication that respondents complain about Sandicor's system costs that were passed on to MLS users.

Such is not the case. Respondents have never asserted there was anything unlawful about Sandicor's system costs passed on to MLS users. At all times they have complained about the fixed *support* prices.

Petitioners' Question Presented reads, "Whether, as the Ninth Circuit held, an agreement between joint venturers to set a price for services that are concededly necessary to support their new, pro-competitive product may nevertheless be condemned, under Section 1 of the Sherman Act, as unlawful per se?" Petitioners are incorrect in their assertion that respondents "concede" that fixed prices were necessary. While support services and their attendant prices were necessary, it was not necessary that such support prices be fixed. In addition, the question presented fails to distinguish between a situation where a little price-fixing was arguably necessary to get a pro-competitive joint venture off the ground, and continuing price-fixing that had long out-lived its arguable need. Thus, the question presented was a misleading description of the issues in the case, for these reasons, and more presented below.

2. Litigation in the District Court and Court of Appeals

Respondents filed suit for violations of Section One of the Sherman Act because of price-fixing, among other legal theories. The primary defenses of respondents were: (1) the district court did not have subject matter jurisdiction because respondents had not proven sufficient interstate commerce effects, (2) the associations and Sandicor should be considered a single enterprise immune to Sherman Act scrutiny, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and (3) the associations, having

created a pro-competitive MLS, were entitled to compensate themselves with the emoluments of a price-fixing agreement. The district court accepted the second defense, and gave judgment to petitioners.

The court of appeals reversed, holding respondents were subject to Sherman Act scrutiny, and the district court was correct in determining that subject matter jurisdiction was present. The court of appeals also rejected the notion that joint venturers could reward themselves through price-fixing.

3. What was *Not* Litigated in the District Court and Court of Appeals

The petition does not press any of the theories litigated in the lower courts. Instead, petitioners adopt a theory that received only scant attention in either of the lower courts, and is supported by no admissible evidence. Respondents claim that fixing prices at supra-competitive levels was essential both to the formation of Sandicor and the continued operation of Sandicor.

Petitioners do not cite to any evidence in the record to support their assertion that fixing support prices at supra-competitive levels was "essential" to the creation of Sandicor. While argued extensively by respondents in the court of appeals, as here, there was never any evidence in the record to support such assertions. There was much evidence against such an astonishing proposition. For instance, there was evidence of many other regional MLSs that operated successfully without fixing support prices. C.A. ER 101-109. There was testimony by executive officers of the petitioners that they could think of no harm that would befall Sandicor if support prices were not fixed.

C.A. ER 590-592. There was the extensive evidence, described above, that before Sandicor, support prices were not fixed in the North and South MLSs, and they operated successfully. There was evidence that after Sandicor, the operating agreements provided that if any of the associations ceased to be shareholders of Sandicor, that such withdrawing associations would be able to set their support prices independently. C.A. ER 251 ¶ 6.1.4. There was the testimony of two executive officers that they would not have fixed support prices if they had known it was illegal. *See, e.g.*, Alkire, C.A. ER 182.

The only hint of evidence that Sandicor would never have come into being without fixed support prices comes in passing in a 42-page declaration by Anita Alkire, at C.A. ER 955-996. Ms. Alkire was at the June 17, 1991, price-fixing meeting as one of the delegates from the Pacific Southwest Association (then called South Bay). She stated in her declaration, "Sandicor would never have come into existence without providing for the continued existence of the local service centers." C.A. ER 971 ¶ 38:20-21. She also states, "Our decision for Sandicor to charge a fee of . . . at least $25 per user per month seemed necessary for the Boards to be able to continue the combined availability of service center and Board facilities and personnel." C.A. ER 974 ¶ 41:2-7. Respondents objected to that testimony as hearsay, speculation, and without foundation. C.A. ER 1261-1262. In its decision granting summary judgment to petitioners, the district court ruled at ¶ 9, "Plaintiffs' objections to the Declarations of Anita Alkire, June Barlow, John Holley, Diane McMillan, and Mark Marchand are OVERRULED insofar as the Court has relied upon those declarations in its analysis." Pet. App. 77a.

Neither side requested the district court to clarify its ruling. As it reads now, in retrospect, there is an ambiguity. Either the district court overruled the respondents on Ms. Alkire's testimony, and relied on the testimony as admissible, or the district court disregarded Ms. Alkire's testimony as inadmissible. In any event, nothing in the district court's opinion suggests that the district court used Ms. Alkire's testimony on these topics in its analysis. Since the parties were focused on the *Copperweld* defense, and since the district court had made its determination abundantly clear, there was no need for clarification – at that time. But now that petitioners are swerving over to a new theory, a ruling of the district court is required. If the district court sustained the objections of respondents, then petitioners have waived this defense by failing to appeal the evidence ruling. In any event, petitioners have failed to preserve this ground of defense in this Court by failing to obtain a ruling to the objections.

The discussion of the previous several paragraphs dealt only with the *original* need for price-fixing to assist Sandicor in its birth. There was no evidence whatsoever that Sandicor needed ongoing price-fixing of support prices to maintain a successful MLS. Indeed, the contrary evidence just cited was very strong against such an idea.

Other substantial matters were not determined in the lower courts. No damages were determined. Respondents' renewed application for class certification is currently pending. Respondents' application for injunction was referred back to the district court by the court of appeals. The court of appeals referred several other types of price-fixing and restraints of trade back to the district court. In

short, much work needs to be done before the decision in the case is final.

ARGUMENT

1. The Court of Appeals Decision is Interlocutory

The Petition should be denied because the decision of the court of appeals is interlocutory. The court of appeals remanded the case for consideration of such issues as the five *other* types of price-fixing proven by the plaintiffs (Pet. App. 16a, fn. 16), the requested injunction, damages, and class certification.

"[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, the lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application." *Id.* In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) this Court denied certiorari "because the Court of Appeals remanded the case [and thus] is not yet ripe for review by this Court." *See, Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

To be sure, there have been departures from "the Court's normal practice of denying interlocutory review,"

Estelle v. Gamble, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), but they tend to be cases of paramount importance with clear-cut answers, factors not present here. *See*, Stern, et al., *Supreme Court Practice, 7th Ed.,* 1993, § 4.18. The Petition should be denied so that the district court, in the first instance, can evaluate the numerous remaining issues and enter a final judgment.

2. There is No Split in Authority Between the Courts of Appeals

Petitioners have mischaracterized the basis of the decision of the court of appeals. That being the case, there is scant reason to examine whether there is any conflict. The court of appeals' decision is correct and does not conflict with the decision of any other court.

The First Circuit, according to petitioners, "has repeatedly held that a price agreement that is 'part of a larger, legitimate economic venture' is not unlawful per se." Petition at 11. Cited for this principle are *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001) and *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 51-52 (1st Cir. 1998). At the threshold, even taking petitioners' characterization of these authorities at face value, they are entirely inapposite, as the Ninth Circuit concluded quite emphatically that the price-fixing scheme the petitioners applied to their MLS support services was *not* a part, at least not a legitimate, appropriate part, of the county-wide MLS service offered by Sandicor. *See, e.g.*, Pet. App. 23a-24a ("any elements of novelty and cooperation in the MLS are irrelevant to whether support fees are fixed or set competitively"; "fixed support fee is not reasonably ancillary to the combined MLS

database. Defendants offer no explanation for how it improves efficiency of the MLS or has any effect at all beyond raising prices"). In any event, it is quite unlikely the First Circuit, based on *Augusta* and *Addamax*, would resolve this case any differently.

Augusta arose in the wake of the progressive concentration of market power in the magazine distribution industry in Maine, from five distinct firms at the start of the relevant time period to one regional distributor at the end – a joint venture comprised of some, but not all, of the original five firms, along with some preexisting regional distributors. Augusta, in the process, was forced out of business, and sued claiming the joint venture's practice of paying up-front fees to large retail stores in order to procure distribution contracts was a *per se* violation of Section 1. *See generally* 269 F.3d at 42-44. The First Circuit held in favor of the defendants, but its basis for doing so provides scant evidence indeed of any "conflict" with the Ninth Circuit's treatment of the pertinent issues.

The *Augusta* court started out by recognizing that price-fixing was a "classic case" of a *per se* antitrust violation, and qualified that statement only by citing to *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) and summing up its holding as follows: "The only price-fixing agreements that are condemned *per se,* with one narrow exception (minimum resale price-fixing), are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger, legitimate economic venture." 269 F.3d at 47. It is this passing reference to a "larger, legitimate economic venture" which petitioners take to indicate some doctrinal schism between the First and Ninth Circuits. *See* petition

at 11. Further analysis of petitioners' argument, and the *Augusta* opinion, however, negate that proposition.

Petitioners maintain that the up-front fees were not "strictly necessary" to the joint venture and might well have been "attacked under the rule of reason," but that, because (without more) they were "part of a 'bona fide joint venture,' they could *not, as a matter of law*, be attacked as unlawful per se." Petition at 11 (emphasis in orig.). On analysis, however, *Augusta* provides no support for that proposition. To be sure, it does allow that an otherwise unassailable joint venture may be attacked under the rule of reason if "the venturers . . . impermissibly collaborate beyond the necessary scope of the venture," citing to *Addamax,* 269 F.3d at 48. To read this passage as petitioners do, i.e., to provide that participation in a joint venture, without more, somehow immunizes the venturers from ever being subject to *per se* condemnation, would be patently erroneous, and *Addamax*, in the passage cited by *Augusta*, proves it. *Augusta*'s citation is to footnote five at page 52 of the *Addamax* opinion, which reads in pertinent part:

> *United States v. Topco Associates,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), would probably be explained today by noting that the anticompetition restraint in question was considerably broader than necessary to make the joint venture work. *Topco,* 1972 WL 669 (N.D.Ill.1972) (on remand), 414 U.S. 801, 94 S.Ct. 116, 38 L.Ed.2d 39 (1973) (affirming judgment).

152 F.3d at 52, n.5. *Topco*, of course, is one of the seminal *per se* cases the effect of which petitioners seek to diminish. *See* Petition at 8, 18-19. But *Addamax*, and *Augusta* through its favorable citation to *Addamax*, do no more than agree with the Ninth Circuit in this case: a restraint

which is supposedly "ancillary" to an otherwise permissible joint venture, but which is "considerably broader than necessary to make the joint venture work," is no less subject to *per se* attack than it would be if it were not somehow connected to a joint venture.[3]

Petitioners' citation to *Addamax* misses the mark for an additional reason: the petitioners have misapplied the case factually, so they end up comparing apples and oranges. *Addamax*, as petitioners note, held "'conduct that is strictly ancillary to [a] productive effort (e.g., *the joint venture's decision as to the price at which it will purchase inputs*) is evaluated under the rule of reason.'" Petition at 12 (emphasis in orig.). True enough, but when petitioners go on to describe this case as one in which they "agreed to a price at which they would 'purchase inputs' – *i.e.*, support services necessary for the new MLS," *id.*, they materially mischaracterize the facts. *Addamax* involved a situation in which a joint venture, pursuant to a process of competitive bidding among third party vendors, arrived at a price it would pay, *see* 152 F.3d at 50; this case involves a situation in which the petitioners, competitors in the MLS support service market, agreed on a price they would charge. That is the essence of horizontal price-fixing,

[3] Viewed in this light, *Augusta*'s suggestion, that impermissible collaboration beyond the necessary scope of a joint venture must needs be evaluated under the rule of reason, appears to be simply erroneous; it is certainly unaccompanied by any analysis which would explain its departure from *Topco* and the favorable citation to *Topco*, on this very issue, by the *Addamax* court. Such judicial pronouncements, at best unreasoned, are not the stuff of which inter-Circuit conflicts justifying discretionary Supreme Court review are made.

recognized in the First Circuit as in others as a classic *per se* violation of § 1.

It is recognized as such in the Seventh Circuit as well. Petitioners cite *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) and *Chicago Prof. Sports Limited Partnership v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) to argue there exists a conflict there as well. Once again petitioners are incorrect.

Polk Bros. involved an agreement between neighboring retailers to refrain from competition while deriving benefits from their complementary inventories. The agreement, held the Seventh Circuit, had to be evaluated under the rule of reason because it was not a "naked" but an "ancillary" restraint: it "may contribute to the success of a cooperative venture that promises greater productivity and output." 776 F.2d at 189. Moreover, the agreement involved "productive cooperation" and one of the two parties "would not have entered into this arrangement . . . unless it received assurances that [the other party] would not compete with it in the sale of products that are the foundation of [its] business." *Id.* at 190.

Chicago Prof. Sports first reaffirmed that "agreements among business rivals to fix prices are unlawful *per se.*" 961 F.2d at 671. It went on to evaluate a National Basketball Association rule limiting the ability of individual teams to sell broadcasting rights to their games under the rule of reason, having found the league, for purposes of discussion, to be a joint venture. *See id.* at 673. Petitioners characterize the case as holding "legitimate collaborative activity is either lawful . . . or else assessed under the Rule of Reason," Petition at 13 (original punctuation omitted);

in petitioner's view there is simply no room for *per se* analysis if a joint venture is involved.

That principle would raise some eyebrows in the Seventh Circuit. In *Premier Electrical Constr. Co. v. Nat'l Electrical Contractors Ass'n, Inc.*, 814 F.2d 358 (1987), the Seventh Circuit (indeed the same judge who authored both *Polk Bros.* and *Chicago Prof. Sports*) emphatically rejected such a doctrinaire view:

> Organization is a precondition to competition; few products are produced by solitary artisans. The appropriate scope of organization may be very hard to establish, and since *BMI* courts have been appropriately modest about their ability to discern the optimal amount of cooperation in an industry. Cases such as *BMI, United States Trotting* [*Assn. v. Chicago Downs Assn.*, 665 F.2d 781 (7th Cir. 1981)], *Rothery* [*Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986)], and *Polk Bros.* do not eliminate the requirement that there be some productive cooperation as a condition of the application of the Rule of Reason, at least when producers with a high market share agree on price. See *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348-52, 102 S.Ct. 2466, 2475-77, 73 L.Ed.2d 48 (1982). The agreement alleged in this case affected 100% of an economically significant market; it was a naked agreement on price; enforcement mechanisms were in place; the free-riding justification given for the agreement does not identify any actor who will protect the consumers' interests and hold the fee to the level justified by the benefits of the Fund. There is no escape from the conclusion of the Fourth Circuit that the agreement is unlawful per se.

The price-fixing cartel here bears these types of earmarks of a *per se* unlawful restraint, according to this Seventh Circuit analysis. The cartel controlled 100% of the market for MLS support services in San Diego County; it expressly set a uniform price for those services; and there was certainly no one looking out for consumers' interests. As the Ninth Circuit noted, in fact, the price was intentionally set at a supra-competitive level, *see* Pet. App. 25a-26a, and there was never the slightest indication of any effort to hold the fee to the level justified by the benefits of the support services in question.

Gen'l Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984) also indicates the congruence of the Seventh Circuit's approach with that of the Ninth Circuit. Specifically discussing what it takes for a restraint to be considered legitimately ancillary and thereby eligible for Rule of Reason treatment, the Seventh Circuit distinguished *Broadcast Music* and *NCAA v. Board of Regents*, 468 U.S. 85 (1984) thusly:

> But in this case the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing. Although some degree of cooperation among members of National Truck Leasing Association in providing reciprocal services may well promote competition in the truck-leasing industry, no reason has been suggested why that cooperation requires that members be forbidden to compete with each other in leasing trucks.

Id. at 595. Similarly here, the degree of necessary cooperation among the petitioners to make an almost county-wide MLS a reality did not extend to the requirement that they

fix prices at which they sold support services to Sandicor. *See* Pet. App. at 23a ("any elements of novelty and cooperation in the MLS are irrelevant to whether support fees are fixed or set competitively"). Not only is this principle discussed in the *General Leaseways'* opinion congruent with Ninth Circuit law, the Ninth Circuit opinion in this very case favorably cites to it more than once. *See,* Pet. App. at 23a-24a, 25a.

Petitioners' essential point is that, so long as it is somehow connected with a legitimate joint venture, any restraint, no matter how repugnant to antitrust law and policy, must be viewed under the rule of reason and can never be condemned *per se*. That view would command no adherence in the Seventh Circuit, which has repeatedly stressed the *per se* approach is to be preserved in appropriate cases:

> So despite the incentive for firms to take free rides on the activities of trade associations, see M. Olson, The Logic of Collective Action (1965), and despite the potential gains from having all affected firms contribute to any benefits the Fund produces, this is not the sort of justification that a court may accept. To do so would abolish the per se rule against horizontal price-fixing.

Premier Electrical, supra, 814 F.2d at 370.

> The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category.

Gen'l Leaseways, supra, 744 F.2d at 595. On these points all circuits agree: there is, and ought to be, no magical

force field which will shield any and all restraints from *per se* scrutiny, and the talismanic invocation of "procompetitive joint venture" is, and ought to be, no exception. The petitioners in this case entered into a horizontal price-fixing cartel for which there was no justification logically related to any novel or cooperative feature of the associated joint venture. As all circuits agree, that is *per se* unlawful.

3. The Court of Appeals was Right on the Merits

Petitioners seriously mischaracterize the court of appeals' opinion by claiming the court of appeals failed to apply a rule of reason analysis. In fact, the court of appeals did so, applying the methodical step-by-step evaluation of the restrains proven by respondents (price-fixing) and then assessing the competitive benefits offered to be achieved by such restraints. Finding that no competitive benefits were advanced by the price-fixing, the court of appeals declared that such a result was price-fixing that was illegal *per se*. Thus, the *per se* appellation was not the start of the analysis, but the end.

The court of appeals' analysis of the § 1 claim occurs in three sections at Pet. App. 10a, 16a and 22a. In the first section, beginning at 10a, the court of appeals ruled that price-fixing was a § 1 violation under the Sherman Act. *Id.* at 10a-11a. Next, the court analyzed the defense assertion that the associations had not actually sold anything to the plaintiffs. The court cited *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) as support for finding that the associations rendered their services to the plaintiffs and other MLS users, being paid by Sandicor. The court of appeals ruled the evidence showed Sandicor had passed on all of the overcharges to the plaintiffs and other

users. *Id.* at 12a. Next, the court of appeals analyzed petitioners' defense under *Illinois Brick Company v. Illinois*, 431 U.S. 420 (1977), and concluded there was "no reasonable possibility" that Sandicor would sue the associations, thereby providing the legal opportunity for plaintiffs to bring their own suit. *Id.* at 13a. Finally, the court concluded that while Sandicor and the associations could set quality standards for the integrity of the MLS database, that flexibility did not provide a justification for fixing prices. *Id.* at 15a-16a. "Sandicor passed on some portion of that inflated support fee to agents, who paid higher prices for the MLS as a result. This is precisely the type of injury the antitrust laws were designed to prevent." *Id.* at 16a.

The second section of the court of appeals' analysis, Pet. App. 16a-22a, involving the immunity claimed by petitioners under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Petitioners do not pursue this issue in their petition.

The final section of the court of appeals' analysis occurs at Pet. App. 22a-28a, involving application of the rule of reason.

> Defendants offer three reasons why *BMI* and *NCAA* apply. They first claim that the inherent cooperative aspects of the MLS as a joint venture warrant more deferential review. They next argue that fixing support fees is necessary to realize the "underlying notion of fairness of offering the same services at the same prices to all participants." Finally, they contend that Fallbrook and Valley Center's refusal to join the MLS on a decentralized basis made it necessary to fix support fees if the countywide MLS was to exist at all.

The court of appeals applied *Broadcast Music* and *NCAA* to those three justifications. The court carefully examined the restraints to see if they furthered competitive purposes and found that they did not. "We find all the asserted defenses legally deficient or factually unsupported. The record compels the conclusion that defendants violated section 1 of the Sherman act by fixing support fees. The District Court should have denied summary judgment to defendants and granted it to plaintiffs instead." Pet. App. 28a.

In conclusion, the court of appeals indulged petitioners with what amounts to a rule of reason analysis. Even under that more forgiving standard, petitioners still failed the tests as set forth by this Court. Since the premise of the petition, as set forth in Question Presented, was that petitioners did not get the benefit of a rule of reason analysis of their restraints, and since the court of appeals did, in fact, provide petitioners with such a review, the petition must be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS, ET AL.,
Petitioners,

v.

ARLEEN FREEMAN AND JAMES ALEXANDER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

The Ninth Circuit has condemned as classic price-fixing an agreement between joint venturers on the price that their venture would pay for services that concededly are necessary to support a procompetitive new product. The petition demonstrates that the Ninth Circuit's decision conflicts with decisions of the First and Seventh Circuits. Those circuits refuse, as a matter of law, to employ the per se rule to condemn pricing agreements among venturers for services or other inputs that are necessary to bona fide joint ventures.

The petition also demonstrates that the Ninth Circuit's decision subverts the express policy of the Federal Trade Commission and the Department of Justice (the "Agencies") to eliminate the perception that the antitrust laws are hostile to procompetitive, integrated competitor collaborations. The Ninth Circuit, in contrast, ignored the principles set forth in the Agencies' *Collaboration Guidelines*,[1] and relied upon older joint venture decisions, including *United States* v. *Topco Associates*, 405 U.S. 596 (1972), *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), and *Arizona* v. *Maricopa County Medical Society*, 45 U.S. 332 (1982), in rigidly applying the per se rule. Thus, the decision is inconsistent with the trend in this Court's more recent antitrust cases to require a "more extended examination" than the per se rule permits, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 779 (1999), and with the recognition by some courts of appeals that *Topco*'s rigid application of the per se rule to an agreement that, at most, restrains competition created by a procompetitive joint venture, may no longer be "good law."[2]

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[1] Fed. Trade Comm'n & Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000).

[2] *Massachusetts Food Ass'n* v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 n.2 (1st Cir. 1999).

The FTC recently confirmed that there is no issue "more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals."[3] Uniformity in the application of Section 1 to joint ventures is thus of paramount economic importance. Consequently, this petition satisfies this Court's criteria for plenary review. Respondents oppose this petition by attempting to create factual disputes and to distinguish these conflicts, but their objections are contrived and unpersuasive.

1. Respondents' first factual argument is that they have never conceded "that fixed prices were necessary." Opp. 5. But petitioners rely only upon what respondents, like the Ninth Circuit, expressly concede – that the *support services* themselves are a "necessary" part of the new countywide MLS. See *id.* ("support services and their attendant prices were necessary"); Pet. App. 3a (Ninth Circuit acknowledges that support services are "necessary" to new MLS); see also Pet. 4-5. Because the challenged pricing agreement concerned the price of inputs "necessary" to produce the joint venture's finished product (here, a new countywide MLS), the pricing agreement for those inputs should have been viewed as part and parcel of the unquestioned right of a joint venture to set a price for the new product it created, and hence lawful. At the very least, the challenged agreement should have been considered reasonably ancillary to the joint venture and hence not unlawful per se.

Respondents next argue that petitioners "adopt a theory that received only scant attention in either of the lower courts, and is supported by no admissible evidence." Opp. 6. This claim is false. The core "theory" of the petition is that the challenged agreement is lawful and may not be condemned as unlawful per se. That theory was discussed at length by the

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[3] *Polygram Holding, Inc.*, No. 9298, slip op. at 2 (F.T.C. July 24, 2003) (opinion), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf.

Court of Appeals (Pet. App. 22a-28a), and has been petitioners' view from day one.

Respondents also argue that there is no "evidence that Sandicor would never have come into being without fixed support prices." Opp. 7. This claim is both mystifying and irrelevant. It is mystifying because respondents' principal witness asserted the point in his declaration,[4] and because the District Court overruled objections to a declaration by an individual defendant that respondents concede supports the point.[5]

Even if there were some genuine factual dispute on this issue (and there is not), the Ninth Circuit's sweeping application of the per se rule ensures that it will never be resolved. The Ninth Circuit assumed that there was evidence to support "the claim that price fixing was justified to convince the smaller associations to join the countywide MLS" and rejected that argument *as a matter of law*, holding that summary judgment "should have" been entered for plaintiffs. Pet. App. 24a, 24a-28a, 35a. A remand, thus, will not lead to any further development of the record on the issue presented here.

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[4] *See* E.R. 164, 176 (Decl. of Ed Tyson in Support of Motion for MLS Class Certification) ("The three groups [Fallbrook, Valley Center, and South Bay] said that if they didn't get a high price, they wouldn't join the MLS. That was a real concern to the rest of us, because if the associations opted out, then it wouldn't be a truly regional MLS.").

[5] The district court "overruled" (Pet. App. 77a) (capitalization omitted) respondents' objections to several declarations (including defendant Alkire's) insofar as the district court relied upon them. The district court relied upon the very paragraphs (¶¶ 38, 41) of the Alkire declaration that respondents concede (at Opp. 7) are evidence that the pricing agreement was important to the formation of Sandicor. *See* Pet. App. 40a (citing Alkire Decl. ¶¶ 22-42); 41a (citing Alkire ¶ 38); 64a (citing Alkire Decl. ¶¶ 23-42)); *see, e.g.*, ER 971-72 (Alkire ¶ 38) ("Many of the smaller and mid-sized boards of Realtors would simply not have joined in a countywide MLS on terms that would have spelled their demise.").

In any event, no futher factual development is needed. To prevail under Section 1, it is sufficient for petitioners to demonstrate either that setting a price for support services was an integral part of setting the price for the new MLS service itself,[6] or that obtaining the support services from the associations at a fixed per-capita price was a reasonable way for petitioners to provide to the venture what all concede was a necessary input.[7] The "uncontested" (Pet. App. 3a n.1) facts amply support either finding.

2. Respondents also state (Opp. 8-10) that the petition should be denied because the case has not been finally decided. But respondents offer no reason why the interlocutory posture of this particular case should affect this Court's exercise of discretion, and there is none.

It is well-established that "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation."[8] The issue here is an important one on which the circuits are divided. The Ninth

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[6] *See* Pet. 13-14 & n.5. Respondents thus err in suggesting that "Petitioners do not pursue this issue [*Copperweld* immunity] in their petition." Opp. 19. The question presented is broadly framed, and permits arguments derived both from *Copperweld* and from rule of reason cases to explain why the per se rule was misapplied here and why the challenged agreement was lawful under Section 1.

[7] *See* Pet. 14, 16 (*citing, inter alia, Collaboration Guidelines* § 3.2).

[8] R. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002); *see id.* §§ 2.2, 2.3; *see, e.g., Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170 (1994) (granting certiorari following court of appeals' reversal of grant of summary judgment in securities case "to resolve the continuing confusion over the existence and scope of § 10(b) aiding and abetting action"); *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992) (granting certiorari following court of appeals' reversal of grant of summary judgment in antitrust case "[b]ecause of the importance of the issue").

Circuit's decision also undercuts the express policy of the two federal agencies with principal responsibility for enforcing the Sherman Act. The importance of the issue thus warrants review.

There is also only cost, and no benefit, to delay. The Ninth Circuit's remand will not lead to further factual development that will assist the Court in reviewing the question presented; the Ninth Circuit cut that off by holding that summary judgment should have been granted for plaintiffs on this issue. The Ninth Circuit's erroneous decision will also have "immediate" and adverse consequences for petitioners.[9] Rather than affirming the district court's entry of summary judgment, which would have ended six years of meritless federal and state litigation – and which itself significantly deters procompetitive collaboration – the Ninth Circuit now requires petitioners and the lower courts to expend additional resources on such issues as damages, attorneys fees, injunctive relief, and altering the structure of the joint venture, all of which would be avoided if the Ninth Circuit's judgment is reversed.

3. Respondents fail to refute petitioners' showing that the Ninth Circuit's decision conflicts with decisions of the First and Seventh Circuits. Respondents argue broadly that these circuits' decisions "are entirely inapposite" because the Ninth Circuit concluded that the "'fixed support fee is not reasonably ancillary to the combined MLS database.'" Opp. 10-11 (quoting Pet. App. 24a). The argument misses the point. Neither the First nor the Seventh Circuit would have isolated a pricing agreement for a "necessary" (Pet. App. 3a) element of a new joint venture from the rest. Confronted with a pricing agreement for support services necessary to a legitimate, efficiency-enhancing integrated joint venture, they would have rejected a per se challenge.

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[9] *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam); *see* Stern, *supra*, § 4.18, at 259 (citing other cases).

The First Circuit made that abundantly clear in *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001). The court refused to entertain a per se challenge to a stark pricing agreement among horizontal competitors (for per-store fees paid to third parties) because the agreement was part of "a bona fide joint venture." *Id.* at 49; see *id.* at 47 (fee agreement "might be a *per se* violation" if "unconnected to any joint venture"). The First Circuit would have reached the same result here, because (on the Ninth Circuit's own factual recitation) the creation of the new countywide MLS was a bona fide joint venture and the challenged agreement was for inputs not only "connected to" but *necessary* to the new product.

Respondents tortured answer to *Augusta* (Opp. 12-13 & n.3) only confirms the conflict. Respondents try to recharacterize *Augusta* as a case that endorses the per se rule because *Augusta* has a "favorable citation" to a footnote in *Addamax Corp.* v. *Open Software Foundation, Inc.*, 152 F.3d 48 (1st Cir. 1998). That footnote, in turn, supposedly endorses the per se rule for all agreements "'considerably broader than necessary to make the joint venture work.'" Opp. 12 (quoting *Addamax*, 152 F.3d at 52 n.5).

This is nonsense. Respondents' contrived reading is belied by the obvious fact that in neither *Augusta* nor *Addamax* did the First Circuit ever consider whether the challenged agreement was "considerably broader than necessary to make the joint venture work." The court held instead that such an inquiry was germane only to a *rule of reason* challenge.

Thus, *Augusta* cites to footnote 5 of *Addamax* for the point that collaborating "beyond the necessary scope of the venture" is one basis for condemning an agreement "under the rule of reason." *Augusta*, 269 F.3d at 48. Similarly, in *Addamax*, the Court stated in text that agreements "as to the price at which [the joint venture] will purchase inputs" are evaluated "under the rule of reason." 152 F.3d at 52. The appended footnote 5 then reflects the Court's effort to

reconcile that holding with *Topco* by offering its view of how *Topco*'s rigid per se rule "would probably be explained today." *Id.* at 52 n.5.[10]

Respondents also contend that *Addamax* is distinguishable because it involved a joint venture's agreement on "a price it would pay," while petitioners "agreed on a price they would charge." Opp. 13. This is word-play. Petitioners' agreement may also be described as one for the "price it [Sandicor] would pay" for needed services. Both here and in *Addamax*, plaintiffs challenged an agreement among competitors to set an allegedly non-competitive price for an input (here, overhead; in *Addamax*, software) that was necessary for the joint venture's new product. The First Circuit unequivocally rejected such a per se challenge as a matter of law. *Addamax*, 152 F.3d at 50-52. *Augusta* and *Addamax* thus each confirm that the First Circuit would not have condemned the support service agreement as unlawful per se.

Respondents do not attempt to distinguish the Seventh Circuit's decisions in either *Polk Brothers, Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) or *Chicago Professional Sports Limited Partnership* v. *National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996), on their own terms. See Opp. 14. Rather, respondents claim that the Ninth Circuit's decision is consistent with the holdings in two other Seventh Circuit cases, *Premier Electrical Construction Co.* v. *National Electrical Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987), and *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984). But *Premier Electrical* is obviously distinguishable from this case, and *General Leaseways* expressly acknowledges "tension" in this

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[10] *Cf. Massachusetts Food Ass'n* v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 & n.2 (1st Cir. 1999) (*citing Addamax*, and noting that "*Topco* may no longer be good law for its broader proposition that such a restraint [market division] is condemned *per se* even where it is ancillary to a productive joint venture.").

Court's precedent that underscores the need for plenary review.

In *Premier Electrical*, the Seventh Circuit, employing "a strong presumption in favor of the Fourth Circuit's disposition" of a related labor case, condemned "a naked agreement on price" as per se unlawful. 814 F.2d at 368, 371. That labor agreement, however, was not for services necessary to any joint venture's creation of a new product. Rather it was a trade association's effort to manipulate a union contract to raise the labor costs of non-members of the trade association. *Id.* at 368-71.

In *General Leaseways*, the Seventh Circuit applied both the per se rule and alternatively the rule of reason to uphold entry of a preliminary injunction. The court discussed at some length the "tension" (744 F.2d at 593) between the Court's decisions in *Topco* and *Sealy* strictly to enforce the per se rule, and the Court's subsequent decisions to apply the rule of reason in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), and *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). Although it concluded that the per se rule should govern that case, the Seventh Circuit acknowledged that "it is possible that we are wrong" in that holding, and hence chose to "decide also whether, if the case were governed by the Rule of Reason, we would still have to uphold the preliminary injunction on the present record." *General Leaseways*, 744 F.2d at 596. Thus, nothing in *General Leaseways* remotely suggests that the Seventh Circuit today would abandon rule of reason analysis altogether, as the Ninth Circuit did, and exclusively apply the per se rule to an agreement setting a price for an input necessary to the creation of a procompetitive new product. If anything, the Seventh Circuit's acknowledgment of "tension" in this Court's decisions supports the need for plenary review.

4. Respondents conclude their opposition by briefly asserting that the Ninth Circuit's decision was "right on the merits." Opp. 18 (capitalization omitted). Their principal

claim is that the Ninth Circuit "indulged petitioners with what amounts to a rule of reason analysis." *Id.* at 20. This is not true. The Ninth Circuit offered only an explanation of why it did not *need* to engage in a rule of reason analysis. See Pet. App. 22a-28a. At no point, for example, did the Ninth Circuit balance the procompetitive effects of the new countywide MLS against the anticompetitive effects of an agreement setting the price for obtaining the overhead and support necessary to provide that new product.[11]

Respondents also fail to address the core errors in the Ninth Circuit's analysis. By following a *Topco*-like approach that divorced the pricing agreement from the joint venture that it supported, the Ninth Circuit's decision is "antithetical to the modern antitrust jurisprudence that began shortly after *Topco*."[12] Where the challenged restraint affects at most only the price of a new jointly produced product, and does not alter the price of any product that the venturers independently provide, it is absurd to condemn that restraint as "unlawful per se" without regard to the procompetitive benefits of the joint venture.[13]

The Ninth Circuit's per se condemnation of this agreement thus reinforces the perception that the antitrust laws are

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[11] *Compare* Pet. App. 22a-28a, *with General Leaseways*, 744 F.2d at 591-96 (explaining why per se rule, rather than rule of reason, should govern), *and id.* at 596-97 (providing rule of reason analysis in the alternative).

[12] T. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 Antitrust L.J. 773, 796 (1998). The author, now chairman of the Federal Trade Commission, wrote the article cited here in his individual capacity.

[13] *Cf.* G. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 710-11 (1998) (criticizing *Topco* because "[p]er se treatment is not appropriate for a restraint on competition created by a joint venture."). The author, Director of Research for the Economic Analysis Group, Antitrust Division, U.S. Department of Justice, did not purport to express the views of the Department. *See id.* at 701 n.*.

hostile to efficiency-enhancing, integrated collaborations that the Agencies, in their *Collaboration Guidelines*, seek to dispel. It also conflicts with decisions in at least two circuits to reject per se analysis of pricing agreements for inputs or services reasonably connected to legitimate joint ventures. These conflicts, in turn, reflect longstanding tension, acknowledged by several courts of appeals, in this Court's joint venture cases. The lack of uniformity and uncertainty in this area of acknowledged national importance fully warrants this Court's review.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS® et al.,

Petitioners,

vs.

ARLEEN FREEMAN AND JAMES ALEXANDER,

Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL ASSOCIATION OF REALTORS® FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Association of REALTORS® (hereinafter NAR) respectfully moves this Court for leave to file a brief as *amicus curiae* in support of the Petition in this case.

Pursuant to Rule 37.2 of the Rules of this Court, NAR sought written permission of all parties to the filing of a brief as *amicus curiae*. Petitioners consented but Respondents declined to do so. Counsel to Petitioners orally requested, on behalf of NAR and other potential amici, such permission from David Barry, counsel to Respondents. Mr. Barry advised that Respondents denied the request. Accordingly, NAR must file this motion with the Court.

NAR submits that there are compelling reasons for the Court to grant this motion. As described in NAR's statement of identity and interest in the attached proposed *amicus curiae* brief, NAR is a national real estate trade association whose membership is comprised of local Realtor® associations and individuals directly impacted by the ruling below. NAR's concern for this case arises out of the substantial adverse impact the Ninth Circuit's ruling will have on the ability of NAR's 1600 constituent local Realtor® associations to fully and effectively serve their members, and, correspondingly, on the ability of those associations to equip their members to best serve the public.

NAR's proposed *amicus* brief does not replicate the arguments persuasively advanced in the Petition. Rather, NAR's brief explains how the Ninth Circuit's holding to apply *per se* antitrust analysis to a joint venture of local Realtor® associations is certain to have a pervasive and significant dampening effect on the willingness of such

associations to undertake joint ventures and other collaborative enterprises to serve their members.

Accordingly, NAR moves this Court for leave to file the attached proposed brief as *amicus curiae* in support of Petitioners.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, the National Asscciation of REALTORS® (hereinafter NAR) submits this brief in support of the Petitioners.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NAR is a non-profit professional association incorporated in Illinois and representing persons engaged nationwide in all phases of the real estate business, including brokerage, appraising, management, and counseling. Founded in 1908, NAR is well known to be a champion of the interests of real estate professionals and real property owners throughout the United States. NAR's membership includes 54 State Associations of REALTORS®, nearly 1600 state and local member Associations of REALTORS®, and approximately 951,000 REALTOR®[2] and REALTOR-ASSOCIATE® members.

NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence among real estate practitioners. In pursuit of these objectives, NAR engages in a wide range of activi-

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[1] The Petitioner has consented to the filing of this brief. The letter of consent has been filed with the Clerk of the U.S. Supreme Court. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

[2] "REALTOR®" is a federally registered collective membership mark used by members of the NATIONAL ASSOCIATION OF REALTORS® to indicate their membership status.

ties, including development and distribution of professional education programs, promotion of equal opportunity in housing; enhancing a high level of professionalism in real estate practice by promulgating a Code of Ethics and insuring enforcement thereof, developing sound multiple listing service policies and practices to be employed by local associations, and creating programs to enhance cultural diversity among members and the clients and customers of members. NAR members agree as a condition of membership to adhere to the strict Realtors® Code of Ethics, to ensure their professionalism and competence.

Local Realtor® associations offer a wide variety of programs, services and products to their members designed to assist real estate professionals in their business activities and the services they offer to the public. These programs and services include multiple listing services, such as that operated by Petitioner Sandicor; professional education programs; government affairs programs to inform legislators and regulators about real estate issues and to advocate legislation and regulation beneficial to the industry and owners of real estate; professional standards activities and procedures, by which members are educated about the Realtors® Code of Ethics and alleged violations of the Code are adjudicated; tribunals to arbitrate, rather than litigate in the local courts, real estate-related disputes between members; and real estate related products, such as form listing and sale agreements, business and office supplies such as real estate signs, and educational publications and texts.

NAR's concern for this case arises out of the substantial adverse impact the Ninth Circuit's ruling will have on the ability of NAR's 1600 constituent local Realtor® associations to fully and effectively serve their members, and, correspondingly, on the ability of those associations to equip their members to best serve the public. Because NAR is

often called upon to assist in advising local Realtor® associations and their counsel regarding the formation of various joint ventures and other collaborative activities, NAR also is in need of this Court's guidance regarding the proper antitrust analysis applicable to such enterprises.

SUMMARY OF ARGUMENT

Local Realtor® associations provide many valuable and pro-competitive benefits to their members. Association members are consumers of the services offered by local Realtor® associations, and just as 21st century consumers of products sold by commercial retailers have come to have heightened expectations of high quality at low cost, members of Realtor® associations have likewise developed increasingly demanding expectations for the programs and services provided by their associations. Realtor® associations also are highly motivated to offer high quality products and services because they compete with other associations to attract real estate practitioners to become members and to purchase the products and services the associations offer.

To satisfy the rising expectations and demands of their members and to attract other practitioners to join or purchase association services, many Realtor® associations have begun to more vigorously pursue creative approaches to increase the quality and lower the cost—and price—of their programs, products and services. One important way many have sought to achieve this result is to collaborate with other Realtor® associations to jointly offer programs, products and services that none acting individually could offer, or to offer them at a price or on other terms than none could alone provide.

The MLS challenged by plaintiffs in this case, Sandicor, is but one example of such a collaborative enterprise,

formed to provide a previously unavailable type (or level) of service to members of the participating associations. The holding of the Ninth Circuit, however, condemns this service as incorporating an unlawful price fixing conspiracy, employing the familiar but unforgiving *per se* antitrust analysis. The effect of this holding will undoubtedly be to discourage local Realtor® associations from pursuing innovative efforts to combine their resources and talents to offer new or enhanced products or services to their members. It will stifle local associations from joining together to serve their members in better and unique ways. The fear of litigation that this holding threatens will cause association volunteers, professional staff, and even counsel to be reluctant if not wholly unwilling to risk personal liability by engaging in the development and implementation of programs by which associations might work together to jointly serve their members. And it will serve as a basis for plaintiffs to assert and courts to rule that a product or service offered by a joint venture of associations is unlawful *per se* simply because it incorporates an agreement among participating associations that is an inherent aspect of the joint venture, instead of subjecting that agreement and the joint venture of which it is a part to specific analysis of whether its formation and operation has pro-competitive benefits that outweigh any restrictive aspects of the respective associations' participation in the enterprise.

Thus, NAR urges this Court to grant the Petition to review the applicability of the *per se* rule to efficiency-enhancing joint ventures among Realtor® associations and other associations and enterprises engaged in such collaborative activities.

ARGUMENT

NAR adopts and endorses the Petitioners' Statement of the Case and the reasons offered by Petitioners why this case merits review by this Court and correction of the Ninth Circuit's erroneous conclusions of law. NAR offers this brief to separately explain to the Court why the holding of the Ninth Circuit will have a substantial adverse affect on local associations of Realtors® across the country, as well as associations serving members in many other fields.

1. Realtor® Associations Provide Considerable Pro-Competitive Benefits to Their Members, and Their Ability to Do So is Enhanced By Collaboration Among Associations. The entire Realtor® organization has closely monitored this case during it's long tenure because of the obvious potential impact on the operation of an important member service—a multiple listing service ("MLS") formed and operated jointly by group of local Realtor® associations.[3] The Ninth Circuit's holding that antitrust claims directed at joint ventures or other collaborative efforts of several Realtor® associations should be analyzed under the *per se* rule has considerably broader implications of equal or even greater concern to local Realtor® associations.

Trade associations like NAR and its constituent local and state associations, like all trade groups, are established

[3] Presently there are approximately 94 regional MLS's of significant size established and operated by two or more local Realtor® associations, and over 700 MLS's created and operated by a single association. For many of the same reasons described in the Petition and the Ninth Circuit's opinion, there continues to be a clear trend for MLS's operated by a single association to consolidate with others to form a regional MLS.

for the very purpose of improving industry conditions[4] and providing valuable services to their members. Some programs and services offered by associations are intended to advance the business prospects of their members by shaping the legal and business environment in ways that will allow the members' businesses to flourish. Other association activities offer services, facilities or functions which members can use in conducting business affairs. Often these services consist of enterprises that cannot readily be established by a single member acting alone. The MLS is just such a facility, providing participants with a highly efficient and readily available opportunity to cooperate with many competing real estate agents in the sale of real estate. Other common association activities—education programs, conventions and meetings, government affairs and other legislative efforts, promulgation and enforcement of ethical and professional standards, preparation and distribution of valuable business forms and publications, and others, are all enormously beneficial and pro-competitive, because they enhance the business competence and capabilities of all participating members. Realtor® organizations engage in all these activities and more in service to their members.

Just as individuals and real estate companies come together to form associations for their common benefit, associations also combine resources and efforts to produce programs and services that will better serve their respective members, or serve the members in ways that individual associations are unable to do. Moreover, in the same way that many commercial enterprises have faced increasing demands from their customers in recent years, the "customers" of Realtor® association programs and services—that is, members of Realtor® associations—have developed increasingly higher and higher expectations for the scope, nature and quality of the services delivered

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[4] See, e.g., I.R.C. §501(c)(6) and Treas. Reg. §1.501(c)(6)-1.

by their local Realtor® associations. Simply put, they expect and demand more value for their association dues dollars. These member expectations put pressure on associations to do more for their members with less, and to be increasingly accountable to their members to use dues-supported financial and other resources as fully, effectively and efficiently as possible.

In response to these pressures and demands from their members, and encouraged by NAR, local Realtor® associations have increasingly sought to collaborate with each other to offer jointly various programs and services. The resulting collaboration among Realtor® associations benefits members by making available not only higher quality or lower cost programs and services, but in many cases by making possible products and services that no association acting alone could offer at all. These collaborative efforts of associations thereby result in significant pro-competitive effects by enhancing the quality as well as the scope of the pro-competitive services the associations provide to their members.

2. Local Realtor® Associations Cooperate In Many Ways to Jointly Offer More and Better Services to Their Members. An obvious example of collaboration among Realtor® associations is, of course, a regional MLS like Sandicor, the MLS created jointly by Petitioners to offer countywide MLS services to their members. In addition to operating MLS's, though, Realtor® associations engage in a myriad of agreements, joint ventures and other cooperative efforts to expand or improve services provided to their members. Associations frequently join together, for example, to offer professional education programs so that they can collectively present higher quality programs, or simply a larger number of programs, than could a single association.

Associations also collaborate to offer lock-box systems[5], particularly since such systems often require substantial capital investment to acquire the lock boxes sold or leased to members and the computer and other hardware and software necessary to operate such a system. Other examples include associations cooperating to collectively produce publications, to own, lease or operate office or meeting facilities, to conduct conventions and conferences, to acquire and use expensive computer capabilities for membership databases and other association records management functions, and even to jointly hire and employ staff, consultants and others necessary to perform various functions essential to association operations, including executive management, accounting services, legal counsel and other advocacy and information services.

Programs and services established and offered collectively by several associations require discussion, negotiation and agreement regarding the terms and conditions on which the various services will be offered, the respective contributions of each association to the joint venture, and the rights and duties of each association and its

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[5] A lock box is a secure box affixed temporarily but irremovably to a home being offered for sale. Each real estate agent participating in the lock box system obtains a number of such boxes and a master key that opens all the boxes in the system. A box placed on a home contains a door key for the home on which the box is located. This system allows any participant the ability to access the home to show it to interested buyers without having to first visit the listing broker's office to secure a key. Many modern lock box systems use electronic key facilities which not only open the box in which the house key is located, but also record a unique code which allows the listing broker marketing the property to identify all other real estate agents who have accessed the box to show the property. By facilitating the ability of agents to show property to prospective purchasers, lock box systems provide a significant and pro-competitive benefit to participating real estate brokers and agents.

members to enjoy the benefits of the product or service provided. For example, associations cooperate to jointly offer to their members education programs that neither could offer alone, or in which neither would risk investing the necessary time and human and financial resources for fear that such a program would not be of interest to a sufficient number of members. The responsibility for marketing the program to members is often shared among all participating associations, with the associations agreeing that a portion of the course registration fees collected be paid to each association to offset a portion of their contribution to sponsoring and marketing the course. A number of Realtor® associations have also combined resources to establish a lock box system, with each offsetting their respective share of the costs to acquire and operate the system by marketing the sale or lease of lock boxes to their own members.

In such cases the participating associations may seek, or even demand, compensation from the joint venture in return for their respective contributions to the creation and operation of the program or service. For example, associations jointly offering and marketing a lock box system might agree on a fee to be paid to each by the joint venture for their respective marketing efforts. Agreement regarding the amount of such compensation may be necessary to persuade the associations to participate in the joint venture at all. In other cases participating associations may be induced to participate in joint ventures only upon agreement among the associations regarding some other aspect of delivery of the service. For example, several associations might be induced to offer a joint education program only where the associations each retain the exclusive right to market and sell the program to their own members, and to be compensated at a prescribed rate for doing so.

3. This Litigation Vividly Demonstrates That the Ninth Circuit's Holding Will Deter Formation of Beneficial Collaborative Relationships Among Local Realtor® Associations. Perhaps the most poignant example of the ominous impact that application of the *per se* rule will have on local Realtor® associations joining together to form joint enterprises to serve their members more effectively is the present litigation. Petitioners—the local Realtor® associations that own and operate Sandicor, as well as Sandicor itself—have, of course, experienced the financially and emotionally destructive force of this litigation. Unwitting victims of this case are also those employees of Petitioners who were previously parties to the case, and even more unfortunately, the *unpaid, volunteer* directors and officers of Petitioners who were likewise party defendants for much of this litigation. The latter individuals are real estate professionals who, in addition to conducting their (usually full-time) professional business activities as real estate brokers and agents, freely offered countless uncompensated hours and tireless efforts in service to the defendant associations, and thus to their fellow real estate professionals. Their vision brought about Sandicor, which even Respondents concede substantially enhances the MLS service enjoyed by thousands of San Diego area real estate brokers and agents, advances competition among those brokers and agents, and well-serves real estate buyers and sellers. For their trouble, they were subjected to the extraordinary personal stress and expense of this litigation. It takes little imagination to foresee that future volunteer officers and directors of Realtor® associations will, under the Ninth Circuit's ruling, be unlikely to expose themselves to similar travails of litigation and potential liability under the antitrust laws by participating in the development of efficiency-enhancing collaborations among the Realtor® associations they serve.

4. Because the Ninth Circuit's Holding Will Significantly Inhibit Associations from Joint Venturing to Better Serve Their Members, this Court Should Grant Review to Declare That the *Per Se* Rule Does Not Apply to Agreements Necessary to Collaborative Activities. The Ninth Circuit's holding will have a profound impact on the willingness of local Realtor® associations, indeed on any group of professional associations, to continue to seek ways to join together to form joint ventures and other collaborative efforts to improve or expand services to their members. Prior to the Ninth Circuit's decision, local Realtor® associations, and NAR when called upon to advise them, could assess the antitrust implications of such joint enterprises by consultation and reliance on not only the decisions of the First and Seventh Circuits[6], but also on the guidance offered by the United States Department of Justice and the Federal Trade Commission in their jointly issued Collaboration Guidelines[7]. That guidance advises that "where participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its pro-competitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered illegal *per se*."[8] In light of the Ninth Circuit's ruling, however, the vitality of such guidance is seriously compromised, and NAR seeks clarification from this Court.

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[6] *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48 (1st Cir. 1998); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985); *Chicago Professional Sports Limited Partnership v. National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996).

[7] Fed. Trade Comm'n & Dept. of Justice, *Antitrust Guidelines For Collaborations Among Competitors* 1 (Apr. 2000).

[8] Guidelines §3.2, at 8.

Absent review by this Court to consider the Ninth Circuit's conclusion that the *per se* test is applicable to agreements among associations that are a necessary component of such joint enterprises, associations can no longer confidently implement joint ventures based on the advice of counsel and economic advisors that the proposed collaboration has significant pro-competitive effects that outweigh the anticompetitive limitations inherent in implementing it. Such pro-competitive impact is irrelevant under the Ninth Circuit's holding, although it would insulate the associations from antitrust liability under the rule of reason. The threat of antitrust liability under the inflexible *per se* standard will likely make local Realtor® associations and their leaders reticent to even discuss proposals for beneficial cooperative relationships where it may be necessary for the associations to agree on an particular aspect of association participation in implementing the service. And NAR and its leaders will be compelled to discourage, rather than encourage, creativity among local association leaders to develop innovative member services and programs requiring collaborative conduct among a number of associations, thereby depriving members of the opportunity to benefit from and enjoy such services. Another result may be the demise of some associations who, lacking the opportunity to collaborate with other associations to offer a full complement of useful member services and programs, may be unable to attract and retain members.

To be sure, several real estate associations could combine to devise a scheme to jointly offer a single program or service that does little more than replicate essentially identical ones offered individually by each association, where no integration of the respective associations' assets is necessary to implement the service and no new or added value is offered by it. Such agreements, whose essential purpose and function is to raise or stabilize the price for the

service and eliminate competition among associations, are rightly subject to antitrust scrutiny and condemnation. Price fixing agreements attendant to such schemes plainly merit *per se* treatment. But where a service or program jointly offered by several associations does not simply reproduce those previously available from the associations, but instead involves genuine integrative collaboration to create a new or improved service that neither association did, or could, by itself offer, a restrictive agreement that is an essential part of implementing that new service or program does not, and should not, offend the antitrust laws. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.") Under the *per se* test as applied by the Ninth Circuit, however, both are equally condemned. The point is not, therefore, that joint ventures by local Realtor® associations to offer new or enhanced services to their members should escape *any* antitrust scrutiny. Rather, NAR submits that it is critical for the Court to review the Ninth Circuit's fundamentally flawed decision to apply *per se* treatment to agreements necessary to legitimate cooperative ventures among Realtor® and other associations. Left undisturbed, that holding will have devastating consequences for both the freedom and the willingness of associations to continue to innovate cooperatively to better serve their members and the public.

CONCLUSION

For the foregoing reasons, NAR respectfully urges this Court to grant the Petition for certiorari.

DATED: September 12, 2003

Respectfully submitted,

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In The
Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS, et al.,

Petitioners,

vs.

ARLENE FREEMAN AND JAMES ALEXANDER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF DAVID J. TEECE AND THOMAS M. JORDE IN SUPPORT OF PETITIONERS

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MOTION OF DAVID J. TEECE AND THOMAS M. JORDE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

David J. Teece and Thomas M. Jorde respectfully move this Court for leave to file a brief as *amici curiae* in support of the Petition in this case.

Pursuant to Rule 37.2 of the Rules of this Court, Professors Teece and Jorde sought written permission of all parties to the filing of a brief as *amici curiae*. The consent of the attorney for petitioners has been obtained. The letter of consent has been filed with the clerk of this Court. The consent of the attorney for respondents has been sought but has not been provided.

There is good cause for this Court to grant this motion. As described in the statement of identity and interest in the attached proposed *amicus curiae* brief, Professor Teece is an authority on matters of economic organization and business conduct, particularly as it relates to competition policy and intellectual property. Professor Teece is the Mitsubishi Bank Professor at the Haas School of Business at the University of California, Berkeley, where he also directs the Institute of Management, Innovation and Organization. Professor Teece has a Ph.D. in Economics from the University of Pennsylvania and has held teaching and research positions at Stanford University and Oxford University. He has testified before Congress on regulatory and competition policy. He is author of over 150 books and articles, and is the editor of "Industrial & Corporate Change" (Oxford University Press).

Professor Jorde received his J.D. from Yale Law School. He is Professor Emeritus of Law at Boalt Hall

School of Law, University of California, Berkeley, specializing in antitrust law. Professor Jorde is a founder of Boalt Hall's Law and Technology/Intellectual Property Program. Professor Jorde is the author of over 25 books, monographs, and articles, and is co-author of "Antitrust, Innovation and Competitiveness" (with David Teece, Oxford University Press, 1992) and "Intellectual Property in the New Technological Age" (with Mark Lemley, Peter Menell, and Robert Merges, Aspen Law and Business Press, 1997). Professor Jorde has testified in hearings before the Federal Trade Commission on competition issues, particularly as they relate to issues in interfirm cooperation.

Professors Teece's and Jorde's concern for this case arises out of their two decades of combined work on, and study of, inter-firm cooperation and contractual relations in the context of antitrust policy. Professors Teece and Jorde have a keen interest in seeing good public policy sustained in this area. They have worked hard to try and help both the judicial and legislative branches of government understand how to distinguish beneficial cooperation from collusion and cartelization.

Professors Teece's and Jorde's proposed *amici curiae* brief does not replicate the legal arguments persuasively advanced in the Petition, nor the arguments set forth in the *amicus curiae* brief of the National Association of REALTORS®, which focuses on the unique importance of this case to the real estate industry. Rather, Professors Teece's and Jorde's brief explains, from the perspectives of a nationally-recognized economist and a professor of antitrust law, the broad deleterious ramifications of the Ninth Circuit's opinion on the economy as a whole, and the need

for clarification from this Court in the area of competitor collaboration for a healthy economy.

Respectfully submitted,

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BRIEF OF DAVID J. TEECE AND THOMAS M. JORDE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, David J. Teece and Thomas M. Jorde submit this brief in support of the Petitioners.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Professor David J. Teece is an authority on matters of technological change and organizational structure, particularly as it relates to competition policy and intellectual property. Professor Teece is the Mitsubishi Bank Professor at the Haas School of Business at the University of California, Berkeley, where he also directs the Institute of Management, Innovation and Organization. Professor Teece has a Ph.D. in Economics from the University of Pennsylvania and has held teaching and research positions at Stanford University and Oxford University. He has testified before Congress on regulatory policy and competition policy, is author of over 150 books and articles, and is the editor of "Industrial & Corporate Change" (Oxford University Press).

Professor Thomas M. Jorde received his J.D. degree from Yale Law School. He is Professor Emeritus of Law at Boalt Hall School of Law, University of California, Berkeley, specializing in antitrust law. Professor Jorde is a founder of Boalt Hall's Law and Technology/Intellectual Property Program. Professor Jorde is the author of over 25 books, monographs, and articles, and is co-author of "Antitrust, Innovation and Competitiveness" (with David

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

Teece, Oxford University Press, 1992) and "Intellectual Property in the New Technological Age" (with Mark Lemley, Peter Menell, and Robert Merges, Aspen Law and Business Press, 1997). Professor Jorde has testified in hearings before the Federal Trade Commission on competition issues, particularly as they relate to issues in inter-firm cooperation.

Professors Teece's and Jorde's concern for this case arises out of their two decades of combined work on, and study of, inter-firm cooperation and contractual relations in the context of antitrust policy. Professors Teece and Jorde have a keen interest in seeing good public policy sustained in this area. They have worked hard to try and help both the judicial and legislative branches of government understand how to distinguish beneficial cooperation from collusion and cartelization.

Professors Teece's and Jorde's proposed *amici curiae* brief does not replicate the legal arguments persuasively advanced in the Petition, nor the arguments set forth in the *amicus curiae* brief of the National Association of REALTORS®, which focuses on the unique importance of this case to the real estate industry. Rather, Professors Teece's and Jorde's brief explains, from the perspectives of a nationally-recognized economist and professor of antitrust law, the broad deleterious ramifications of the Ninth Circuit's opinion on the economy as a whole, and the need for clarification from this Court in the area of competitor collaboration for a healthy economy.

INTRODUCTION

The Federal Trade Commission and the Antitrust Division of the Justice Department frequently point out that in the last twenty-plus years, they have brought relatively few civil cases against competitor collaborations. This notwithstanding, these agencies allow that there is "a

perception that antitrust laws are skeptical about agreements among actual or potential competitors" that "may deter the development of procompetitive collaborations."[2]

To understand why such a notion might persist, one need look no further than the opinion of the Ninth Circuit Court of Appeals in *Arleen Freeman, et al. v. San Diego Association of Realtors, et al.* The Court of Appeals has managed to make out a naked price fix, one worthy of immediate and unflinching per se condemnation, in the ancillary arrangements of a joint venture. Seemingly, these arrangements would not have been subjected even to a rule of reason analysis by the antitrust agencies, but instead would have been allowed without challenge. It is little wonder that there persists the perception that the antitrust laws and the courts remain suspicious, and even hostile, toward competitor collaborations, even when they are procompetitive.

The opinion and judgment of the Court of Appeals in the present case troubles us on a number of grounds, not the least of which is its facile application of per se analysis to the necessary, but entirely ancillary, arrangements of a genuinely procompetitive joint venture.[3] This is because, in today's economy, cooperative arrangements among firms have emerged as a leading source of new products and increases in consumer welfare that could not otherwise be

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[2] Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (the "*Competitor Collaboration Guidelines*"), April 2000, at p. 1.

[3] The rationales by which various courts have chosen between per se and rule of reason treatment of challenged restraints has long troubled economists. For a useful summary of the economic perspective on this issue, see Richard Schmalensee, "Agreements Between Competitors" in Thomas M. Jorde and David J. Teece, eds., ANTITRUST, INNOVATION, AND COMPETITIVENESS (New York: Oxford University Press, 1992).

achieved. But if the judgment below were to stand, the threat of per se condemnation would loom large in the calculus of would-be joint venturers, making them unwilling to risk many collaborations from which consumers and society would benefit. In those instances, our economy would have to make do with the second-best choice of, on the one hand, requiring the would-be collaborators to cease their existence as independent competitors, and instead to merge into single entities beyond the reach of Section 1, or on the other, of foregoing entirely the procompetitive benefits that their collaborations could produce. This seems to us to be an unacceptably high price to pay for the courts' unwillingness, at a minimum, to analyze the ancillary arrangements of an otherwise procompetitive joint venture under the rule of reason. It also is our view that the internal arrangements of a procompetitive joint venture producing a product that would not otherwise exist (and that are reasonably necessary for that product to be produced) should be given the same deference that would be given by the courts and antitrust agencies if the collaborators had merged instead.

THE INCREASING IMPORTANCE OF JOINT VENTURES AS A SOURCE OF INNOVATION AND COMPETITION

The development, commercialization, and diffusion of new products and processes have long been the most fundamental competitive force in advanced industrial economies, generating economic growth, enhancing consumer welfare, and in the process, constantly challenging and frequently overturning the established order within and among markets and industries. Such innovation is unquestionably a major force, if not the major force, driving competition. But increasingly, such innovation has required the cooperative contributions of otherwise independent economic entities.

In the context of studying the international competitiveness of U.S. firms, Nobel Laureate Robert Solow and his colleagues noted nearly 15 years ago:

> Undeveloped cooperative relationships between individuals and between organizations stand out in our industry studies as obstacles to technological innovation and the improvement of industrial performance. . . .
>
> Interfirm cooperation in the U.S. has often, though not always, been inhibited by government antitrust regulation.[4]

Yet despite the interjection of economic thinking into antitrust analysis in earlier decades, it took some time before the courts, the antitrust agencies and the Congress recognized the central importance of cooperative arrangements among independent economic entities to our economic well being. There have been some important developments, including the passage in 1993 of the National Cooperative Research and Production Act (which extended to production joint ventures protections from full antitrust liability that earlier had been accorded to research and development collaborations among firms) and the promulgation in 2000 by the Federal Trade Commission and the Department of Justice of the *Antitrust Guidelines for Collaborations Among Competitors.*

It is now widely recognized by Congress and antitrust agencies that the public interest is served by many forms of cooperative activity among competitors. But potential procompetitive joint ventures and similar cooperative arrangements among competitors remain haunted by the specter of judicial antitrust condemnation.

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[4] MADE IN AMERICA: REGAINING THE PRODUCTIVE EDGE by Michael Dertouzos, Richard Lester & Robert M. Solow (Cambridge, MA: The MIT Press, 1990) at 7, 105.

We have devoted a significant part of our academic and professional careers to the subject of innovative, procompetitive joint ventures and other forms of collaborations among cooperating firms, and to the importance of getting such collaborations analyzed appropriately by the courts and the antitrust agencies.[5] It remains our core belief that procompetitive collaborations among competitors are a powerful engine for the development and introduction of new products and services, for the expansion of economic output, and for increases in total consumer satisfaction. As such, these collaborations ought to be seen as being benign from an antitrust perspective and as efficiency-enhancing from an overall public policy perspective. Accordingly, they ought to be encouraged by the courts.

THE SANDICOR JOINT VENTURE AT ISSUE IN THIS CASE

Before the formation of Sandicor in 1992, San Diego County was served by twelve multiple listing services, each maintained and supported by a different real estate association, with each association operating in its own local part of the county. Some of these associations had earlier taken the decision to share their listings, so that just prior to the creation of Sandicor, there were four different MLS databases covering parts of San Diego County. The costs of maintaining each database were apportioned among the associations using it, and each association provided its own support services, whose scale and scope differed from one association to the next.

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[5] See, for example, Thomas M. Jorde and David J. Teece, "Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology," 61 ANTITRUST L.J. 579 (1993).

Because the county was covered by four different, disjoint MLS databases, a real estate agent who sought access to all listed properties in San Diego County was required to subscribe to four separate MLS products.

During the 1990-1991 period, eleven of these associations decided to enter into a new joint venture, Sandicor, in order to combine their separate databases into a unified MLS product. In return for the payment of a single subscription fee, this integrated Sandicor MLS database would allow an agent anywhere in San Diego County to access all listed properties located throughout the county. Operating costs would be reduced because there would be just one database to maintain.

The members of the Sandicor joint venture standardized the support services that enabled individual agents to utilize the integrated Sandicor MLS database. But they also determined that these support services should be provided locally by Sandicor's individual parent real estate associations, and not by Sandicor itself on a centralized basis.

The joint venturers comprising Sandicor then decided on the terms under which Sandicor would purchase the specified local support services from the individual associations. In order to induce all eleven associations to enter into the joint venture, Sandicor elected to pay the same monthly amount per subscribing agent to each association in return for the local associations' provision of the needed services. The decision to pay the same amount per agent, combined with the facts that these associations historically had widely differing per-agent accounting costs to provide support services and that the agreed-upon rate of reimbursement was higher than the lowest of these historical accounting costs, appears to have exercised the Court of Appeals.

THE RELEVANT ECONOMIC FEATURES OF THE SANDICOR AGREEMENT

The primary purpose of Sandicor was to produce a single, integrated, countywide MLS database providing listings for all of San Diego County that real estate agents could access in return for the payment of a single subscription. Prior to Sandicor, no such product existed, and an agent was required to purchase individual subscriptions to at least four separate MLS database products in order to achieve countywide coverage.

All parties to this litigation, and the Court of Appeals itself, have acknowledged that the creation of this new product of Sandicor was, and remains, unambiguously procompetitive because it increased competition and reduced costs in connection with San Diego County real estate transactions. In particular, it:

- Increased the number of potential buyers for particular listings anywhere in San Diego County.
- Increased the number of competing properties for sale that a prospective buyer could consider.
- Reduced the total cost in subscriptions that an agent needed to pay in order to obtain access to all listings in San Diego County.

Such a countywide MLS database product did not exist prior to the formation of Sandicor by its eleven member associations. *A fortiori*, none of these individual associations actually competed, either alone or in conjunction with other associations, in the production and sale of such a countywide MLS database prior to the decision to form Sandicor.

No single association on its own, or a small group of associations working together, could have produced the countywide MLS database product, because that countywide product required the integration of a least four separately-owned and -maintained MLS database products. Each of these eleven associations had an ownership

interest in one or the other of these four legacy databases. This meant that their integration into a single, countywide product required the voluntary consent and cooperation of each of the eleven associations.

The "support services" at issue in these proceedings were never the principal product of, or reason for, the Sandicor collaboration. While they are necessary in order for the primary product of Sandicor to exist at all, these services were and are merely ancillary to the countywide MLS database itself. They were not the purpose of Sandicor.

Prior to the formation of Sandicor, the term "support services" had as many different meanings and content as there were individual associations. Only with the Sandicor joint venture did "support services" become a well-defined term, with the same menu and scope of "support services" standardized across the member associations.

The "prices" or "costs" associated with the differing pre-Sandicor "support services" of the several associations are not strictly comparable. There are several reasons for this:

- The support services themselves differed from one association to the next.
- Even if otherwise reliable, these "prices" or "costs" are a measure of the *historical* expense to provide "support" to agents in the particular locality served by each association.
- The supposed "costs" of each of these associations to provide "support services" upon which the Court of Appeals has focused must be taken with some skepticism. This is because "support services" is only one of the functions performed by local real estate associations. Because all of these functions (whether expense- or revenue-generating) typically share the same staff, building, furnishings and equipment, the apparent "cost" of support services depends to a considerable degree on the scale and scope of the other

functions performed by the association, as well as on the accounting methods used to "allocate" the total costs of shared staff, building space, furnishings and equipment to particular association functions, including "support services". In other words, two separate associations could expend precisely the same effort and resources per member, and be equally efficient in some absolute economic sense, in providing a specified schedule of support services, but nevertheless show widely differing per-agent accounting costs for these support services because of the economic extent of their other functions, and their potentially different accounting methods for allocating joint revenue and expenses.

Sandicor was formed in 1992, and its San Diego countywide MLS database product has been in existence for about a decade. Sandicor's system of compensating the several associations for delivering the mandated support services has been in operation for the same period. Consequently, there is no need to speculate about possible prospective benefits and costs of the Sandicor collaboration; instead, there is an ample historical record upon which to base any necessary conclusions.

Finally, it is important to remember that Sandicor was formed as the result of the voluntary, unanimous decisions of eleven separate, independent associations, and its continued existence has required ongoing unanimity on their part. Each of these eleven associations, in turn, is governed by its member agents, who have always retained the power to reverse their own association's decision to participate in the Sandicor collaboration.

ANALYSIS OF SANDICOR UNDER THE 2000 *COMPETITOR COLLABORATION GUIDELINES*

In April 2000, the Federal Trade Commission and U.S. Department of Justice issued the aforementioned *Competitor Collaboration Guidelines* in order "to assist businesses

in assessing whether the Agencies will challenge a competitor collaboration or any of the agreements of which it is comprised." *Guidelines* at 2. However, in fashioning these *Guidelines*, the antitrust agencies have for the most part kept their cards close to their vests, reserving the right to exercise judgment and discretion in light of the facts specific to each case, and offering little in the way of general assurances of "per se legality" or safe harbors. Nevertheless, these *Guidelines* support the conclusion that the agencies would not have challenged the Sandicor joint venture or its agreement in respect of payments for "support services", and they state that this agreement would, at worst, be analyzed under the rule of reason. This is a far cry from the treatment the Sandicor agreements got from the Court of Appeals.

In its per se condemnation of Sandicor, the Court of Appeals fixated on the joint venture's establishment of a single price at which it purchased the specified support services from each of its parent associations. If, instead, the eleven associations simply had merged into a single countywide association, that resulting association unquestionably would have been free to establish a single price at which it purchased support services on the open market, or to establish uniform compensation for its employees who provided support services to members. This is because, to our knowledge, no proposed merger involving local real estate associations has been challenged by the agencies in recent memory.

Given the above, it follows, under the terms of the *Guidelines*, that the agencies would not have challenged the arrangements for support services adopted by the Sandicor joint venture. This is because these arrangements are identical to what the associations would have been free to adopt if they instead had merged completely

into a single San Diego County association, a combination that would not have been challenged by the antitrust agencies.[6,7]

Importantly, it is the view of these agencies that it is not required that an agreement be *essential* in order for it to be deemed "reasonably necessary". Rather, under the *Guidelines*, the antitrust agencies "consider whether *practical, significantly less restrictive* means were reasonably available *when the agreement was entered into*, but do not search for a theoretically less restrictive alternative that *was not practical given the business realities* (emphases added)." *Guidelines* at 9. This point is taken up below.

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[6] The *Guidelines* state in relevant part:

> [I]n some cases, competitor collaborations have competitive effects identical to those that would arise if the participants merged in whole or in part. The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines* if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate with a sufficiently limited period. . . . In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger.

Guidelines at 5.

[7] Even assuming, for the sake of argument, that the Sandicor agreement in respect of support services was deserving of per se treatment, by the terms of the *Guidelines* the agencies likely still would have analyzed that agreement under the rule of reason. See, *Guidelines* at 4.

SOME POSSIBLE ELEMENTS OF A RULE-OF-REASON ANALYSIS OF THE SANDICOR AGREEMENT CONCERNING SUPPORT SERVICES

It is not our intention here to offer a full rule of reason analysis or defense of the ancillary Sandicor agreement regarding payment to the individual associations for providing support services. Instead, we simply sketch the considerations and questions that would need to be addressed in the course of a rule of reason balancing of the procompetitive and possibly anticompetitive elements of the Sandicor agreements. We also note that, for the most part, none of these considerations and questions were even recognized, much less dealt with adequately, by the Court of Appeals.

Even accepting, *arguendo*, that the price established by Sandicor for support services was "supracompetitive", a rule of reason analysis should ask, at a minimum, whether the *total* cost of subscribing to all MLS listings in San Diego County had increased or decreased as the result of the Sandicor agreements. It is important, in other words, to recognize that agents' total subscription fees may have fallen substantially, because now agents needed but one subscription to a single MLS database product, rather than the four subscriptions that were necessary pre-Sandicor. A rule of reason analysis would need to determine whether the allegedly "supracompetitive" price for support services was more than offset by savings on the subscriptions themselves. In our view, it was a mistake for the Court of Appeals to focus on the "price" of just support services in isolation.

In any case, it is not obvious, as a matter of economics, that charging a supposedly supracompetitive total cost for MLS subscriptions and support services would have had any impact on consumers by leading to higher real estate prices. It is our understanding that real estate

agents typically charge commissions that are set at a *percentage* of the eventual selling prices of properties. But it is hard to credit, as a matter of economics, that the *selling prices* for San Diego County real estate properties would have been sensitive to (or in any way a function of) the prices paid by agents for MLS subscriptions and support services.

Without much more economic analysis than is apparent in the decision of the Court of Appeals, it simply is not possible to conclude anything about the "prices" or "costs" of support services produced by the individual associations, either before or after the formation of Sandicor. It was uncontroverted that, before Sandicor, the support services offered by each of the individual associations were not the same. It also was not disputed that the scale and scope of the standardized support services mandated by Sandicor were potentially different from those that the individual associations had produced previously. The historical accounting costs of the individual associations to provide pre-Sandicor support services were intended, at best, only to measure the associations' costs to render such support in their respective local areas. Even apart from the conceptual difficulties that potentially bedevil the figures relied upon by the Court of Appeals (see the discussion above), there can be no assurance, without a much more extensive record, that the supposed per-agent costs of the San Diego Association of Realtors (SDAR) would be unchanged if, for example, the SDAR attempted also to provide support services to agents in Valley Center, Fallbrook or other outlying parts of San Diego County.

It may have been the considered business judgment of Sandicor and the individual associations that "support services" are best rendered locally, in close proximity to the agents being supported, and that it would be infeasible for SDAR to provide support services to agents in Oceanside, Escondido, Julian or El Cajon. A court should be

reluctant to gainsay such a judgment without a much more extensive inquiry than that available to or undertaken by the Court of Appeals.

In its attempt to sketch a supposedly less anticompetitive alternative to the Sandicor agreement concerning support services, the Court of Appeals offered that it would have offended the antitrust laws less for the "efficient" associations to have proceeded to a Sandicor-like collaboration that excluded the MLS databases of the "inefficient weaklings" (such as Valley Center and Fallbrook), and for this combination of the "efficient" then to have driven the "weaklings" out of business over time.

Economically-plausible arguments can be offered in support of the conclusion that this course of action would not have made business or economic sense, and would not have been in the best interests of consumers. The associations forming Sandicor may have decided that it was necessary to limit competition among themselves in the production of the ancillary support services, in order to insure the quality and consistency of both those services and of the integrated MLS database itself. For example, these associations may have recognized that it would not be feasible for Sandicor to monitor the support services being produced by each of the parent associations, even though the procompetitive benefits of Sandicor's primary product, the countywide MLS database itself, depended critically on the quality, quantity and consistency of these locally-produced support services.

Obviously, the rationale for the Court of Appeals' supposedly "less anticompetitive" alternative depends on the accuracy, reliability and comparability of the "cost" figures relied upon by that Court. In addition, the Court's preferred alternative proves too much. By its logic, SDAR alone should have been the single provider of all support services anywhere in San Diego County. Anything short of a monopoly on the provision of support services by SDAR would have meant that Sandicor still had agreed to

purchase *some* support services at "supracompetitive" prices (which the Court of Appeals has judged a per se violation) or that these other associations were selling such services at a loss. In any event, it is hard for us to understand why the other ten associations should have willingly subscribed to a Sandicor agreement that might well also have meant their demise.

We note finally that, by the time of the decision at the Court of Appeals, there had been roughly ten years of actual experience under the Sandicor agreements, yet certain events appear *not* to have occurred. For example, it is our understanding that none of the memberships of the eleven parent associations ever elected to secede from the Sandicor collaboration. We take this as evidence strongly suggesting that the agent members of the local associations have concluded, on balance, that the increased benefits of the Sandicor collaboration outweigh their increased costs (if, indeed, there are any). Also, we notice that no single association or small group of associations have decided to produce their own partial-county MLS database product and to compete for the listings and subscriptions of their "inefficient" brethren. We view this as possible support for the conclusion that there really was no "efficient" subset of the eleven associations that was being "overcharged" for support services in order to sustain other, "uncompetitive" associations.

THIS AND OTHER COURTS' SUSPICION OF JOINT VENTURES WILL HAVE ADVERSE ECONOMIC CONSEQUENCES

The Court of Appeals based much of its analysis of the Sandicor joint venture on its finding that the several associations remained independent competitors, and that they had not proceeded to any significant economic integration. As a consequence, concluded that Court, the Sandicor

agreement in respect of support services amounted to naked price fixing among horizontal competitors.

This view of the Court of Appeals is echoed in many of the reported cases involving joint ventures and similar competitor collaborations. In these cases, the courts have focused on whether or not the joint venturers or collaborators have achieved the requisite degree of financial and economic integration to be deemed a single entity for Section 1 purposes. In many of these cases, the courts do an inadequate job of delineating the particular spheres in which the collaborators remain competitors, failing to distinguish competition in other arenas from competition in the novel product of the joint venture itself. We view these tendencies as wrongheaded and unhelpful to the goal of maximizing society's potential benefit from such collaborations.

The potential economic benefit of joint ventures such as Sandicor is that society is able to enjoy a new, procompetitive product or service that could not otherwise exist, *while continuing to enjoy the benefits of competition among the joint venturers in other areas.* In other words, the maximization of this potential social gain depends, in significant part, on the extent to which the collaborators do *not* achieve the financial or economic integration seemingly required by some courts.

Because these same courts then treat these unintegrated competitors as undeserving of the deference the courts routinely give to the decisions of monolithic firms, society loses still further. This is due to the fact that the joint venturers must forego the arrangements that would be both natural and optimal for a single entity, and instead to adopt second-best arrangements that may prevent society from realizing the maximum potential benefit from their collaboration. For example, a single entity may routinely and freely decline to use market mechanisms and price competition to allocate its internal resources and

employees, and to rely instead on hierarchical decision making, and no court would object.

The antitrust laws do not require firms that allow individual employees to "compete" with each other on the basis of price to determine which employee will be assigned to a particular task.[8] It is now recognized in economics that only some allocative decisions are best left to price competition in arms-length markets, and that a significant share of all allocative decisions are made *within* firms using nonprice mechanisms. Indeed, it is understood that the boundary between allocative decisions that are left to price competition in markets and those decisions that are made by internal hierarchies is itself a function of economic forces.[9] Similarly, it now seems well-established in the case law that limitations on, or avoidance of, intrabrand competition (for example, among sellers of a particular branded product) can lead to sharpened interbrand competition that maximizes society's overall economic well being.

The courts should draw a lesson from the fact that firms routinely and legitimately find it optimal to eschew price competition when making some internal decisions, while at the same time using markets for others, and that this choice is governed by economic considerations. The decisions by firms to "outsource" some functions that historically had been carried out internally are a leading example. At the same time, it might be perfectly rational and acceptable for the members of a joint venture (for

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[8] Presumably, appellate judges, when deciding how to assign legal research or drafting tasks, do not always insist on holding auctions among their clerks and assigning the duties to the low-price bidder.

[9] See, as the seminal work, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS by Oliver E. Williamson (New York: The Free Press, 1975) and THE ECONOMIC JUSTIFICATIONS OF CAPITALISM by Oliver E. Williamson (New York: The Free Press, 1985).

example, a collaboration to design, produce and market a new kind of automobile employing fuel cell technology) to allocate certain phases or components of the total productive effort to individual members who were not the "low cost" producer of that phase or component. For example, such a joint venture might agree to purchase the vehicle drive trains from its member enterprises at a cost that was above the price of the most efficient producer. Would the Court of Appeals similarly condemn this joint venture for fixing the price at which it acquired drive trains from its members, without any consideration given to the likelihood that, as a result, the collaboration itself might never be achieved, depriving consumers and society of clearly beneficial technologies and products?

It is our view of the current legal landscape that the court decisions dealing with joint ventures, competitor collaborations and the choice between per se and rule of reason treatment are fraught with inexplicable and inconsistent holdings. We defer to counsel for Appellants to survey the relevant and problematic cases, though above, we have noted the conflict between the Court of Appeals' decision and the likely treatment of the Sandicor agreements by the antitrust agencies.

The ambiguities and inconsistencies we have identified are not merely the stuff of law review articles; they can have significant effects on the real economy. Ambiguities and uncertainities in the law can create a real danger that innovation will be stymied, and that procompetitive collaborations will not be consummated. When the parties to a proposed collaboration have taken pains carefully to consult with antitrust counsel, yet nevertheless find themselves condemned as little more than a cabal of price-fixers, the message to all would-be collaborators is thunderous. Business people dislike uncertainty and risk, and to avoid it, they frequently will take decisions that designed to reduce their legal exposure. In doing so, they may eschew arrangements that would have increased

economic well being. We and society may never know with certainty what "could have been", but we are certain that the cost to our society's economic well being will be significant unless this Court provides clear and reliable guidance to would-be joint venturers. Were the decision at the Court of Appeals to stand, it likely would result in the loss by the U.S. economy and its consumers of the procompetitive benefits that are unattainable only through the collaboration of independent competitors, and instead, make outright mergers the only way to achieve such benefits confidently.

CONCLUSION

For the foregoing reasons, David J. Teece and Thomas M. Jorde respectfully urge this Court to grant the Petition for certiorari.

Respectfully submitted,

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